DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(10)

o. 85-117-ASX
tatus: GRANTED

ocketed:
uly 22, 1985

Title: A. G. Baker, Jr., et al., Appellants
v.
General Motors Corporation and Michigan Employment Security Commission

Court: Supreme Court of Michigan

Counsel for appellant: Rossen, Jordan

Counsel for appellee: Wayman, Jonathan N., Caruso, Louis J.

ntry	Date	Note	Proceedings and Orders
1	Jul 22 1985	G	Statement as to jurisdiction filed.
3	Aug 5 1985		Order extending time to file response to jurisdictional statement until September 23, 1985.
4	Aug 26 1985		Waiver of right of appellee MI Employment Security Comm. to respond filed.
5	Sep 23 1985		Order further extending time to file response to jurisdictional statement until September 27, 1985.
6	Sep 23 1985		Motion of appellee General Motors Corporation to dismiss filed.
7	Sep 25 1985		DISTRIBUTED. October 11, 1985
8	Oct 8 1985	X	Reply brief of appellants A.G. Baker, et al. filed.
9	Oct 15 1985		PROBABLE JURISDICTION NOTED.
			**********
11	Oct 25 1985		Order extending time to file brief of appellant on the merits until December 6, 1985.
13	Oct 25 1985		Order extending time to file brief of appellee on the merits until January 10, 1936.
14	Nov 19 1985		Record filed.
15	Nov 19 1985		Certified copy of original record on appeal received.
16	Dec 6 1985		Brief of appellants A.G. Baker, et al. filed.
17	Dec 11 1985		Joint Appendix received and returned for compliance with Rule 33
18	Dec 11 1985		Joint appendix filed.
20	Dec 23 1985		Order extending time to file brief of appellee on the merits until January 24, 1986.
21	Jan 23 1986		Order further extending time to file brief of appellee on the merits until February 7, 1986.
22	Jan 24 1986		Brief amicus curiae of United States filed.
23	Feb 4 1986		SET FOR ARGUMENT, Wednesday, April 2, 1986. (3rd case)
24	Feb 7 1986		Brief of appellee General Motors Corporation filed.
25	Feb 11 1986		CIRCULATED.
26	Feb 12 1986	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
27	Feb 24 1986		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
28	Mar 24 1986	X	Reply brief of appellants A.G. Baker, et al. filed.
29	Apr 2 1986		ARGUED.

1 PP

JURISDICTIONAL

STATEMENT

85-117

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

FRED ALTSHULER
Altshuler and Berzon
177 Post Street, Suite 600
San Francisco, California 94108
(415) 421-7151

JORDAN ROSSEN
Counsel of Record
RICHARD McHUGH
DANIEL W. SHERRICK
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

Counsel for Appellants

THE INLAND PRESS, DETROIT, MICHIGAN
105

QUESTION PRESENTED

Whether a state may interfere with federal labor laws and the federal right to "form, join or assist labor organizations" by disqualifying individuals from unemployment compensation benefits solely because those individuals paid union dues uniformly and lawfully required as a condition of employment.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

JURISDICTIONAL STATEMENT

Appellants A. G. Baker, Kenneth R. Collier and Robert J. Seidell, whose cases were consolidated by the Michigan Supreme Court, appeal from the final judgment of the Michigan Supreme Court dated January 17, 1985 and the denial of rehearing by the Michigan Supreme Court, dated April 23, 1985, holding that the National Labor Relations Act does not preempt Michigan's interpretation of the Michigan Employment Security Act, thereby denying unemployment compensation benefits to appellants solely because these individuals paid union dues uniformly required as a condition of employment.

OPINIONS BELOW

The denial of rehearing by the Michigan Supreme Court is set forth in Appendix E. The opinion of the Michigan Supreme Court after remand is reported at 420 Mich. 463 and is set forth in Appendix B. The opinion of the Employment Security Board of Review on remand is set forth in Appendix D. The earlier opinion of the Michigan Supreme Court is reported at 409 Mich 639 and is set forth in Appendix C.

JURISDICTION

The judgment of the Michigan Supreme Court, holding that the National Labor Relations Act does not preempt Michigan's interpretation of the Michigan Employment Security Act, was entered on January 17, 1985. A motion for rehearing was denied on April 23, 1985. A notice of appeal was filed in Michigan Supreme Court on July 18, 1985. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(2). This appeal is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provision and statutes will be set out in relevant part in the appendix: First Amendment, United States Constitution; Sections 7, 8(a)(3), 8(b)(2) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 157 and § 518a(3), b(2), and 8(d); Section 101(a)(3), Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(3); 26 U.S.C. § 3304(a)(5); and Section 29(8)(a)(ii), Michigan Employment Security Act, Mich. Comp. Laws § 421.29(8)(a)(ii).

STATEMENT OF THE CASE

Appellants in this case are non-striking General Motors (GM) employees who were held to be disqualified from unemployment compensation benefits solely because they had paid certain uniformly required lawful union dues. The National Labor Relations Board had examined the dues requirement at

issue and found it to be a permissible exercise of the Union's right to require, under valid union security clauses, payment of union dues as a condition of employment.

The Michigan Supreme Court concluded that the payment of these union dues constituted "financing" of certain labor disputes occurring at General Motors facilities other than those at which appellants were employed. The Michigan Supreme Court held that its interpretation of state law directly conflicted with Section 7 of the National Labor Relations Act (NLRA) which guarantees employees the right to financially "assist labor organizations". Nonetheless, the Michigan Supreme Court held that Congress intended to permit such state law interference with appellants' rights under Section 7 of the NLRA. In reaching this conclusion, the Michigan Supreme Court rejected appellants' arguments that the state's application of the Michigan Employment Security Act (MESA)[1] impeded their rights to join unions and bargain collectively through unions. The Michigan Supreme Court also rejected appellants' contention that the state's application of MESA denied their First Amendment rights of free speech and association.

This case has its genesis in the events surrounding the 1967 automobile and agricultural implement industries collective bargaining negotiations.[2] In July 1967, the United Auto Workers (UAW) and several major employers exchanged notices to bargain pursuant to Section 8(d) of the NLRA. (2a-3a). The automobile contracts expired in September 1967. After expiration of those contracts, the UAW called national strikes against Ford Motor Company and Caterpillar Tractor. There was no national strike against GM in 1967.

On October 8, 1967, the UAW increased its regular monthly dues by $10 to $20 a month at a special convention. This dues

---

[1]Mich. Comp. Laws Sec. 421.1, *et seq.* (3a-4a). Pages in the Appendix will be cited as (____ a).

[2]The facts and proceedings are discussed in considerably more detail in the decisions of the Michigan Supreme Court (Appendices B and C).

increase was only required for November and December, 1967. Appellants — as well as all other UAW members — paid the increased dues.

After the dues were challenged as unlawful, the National Labor Relations Board examined the dues increase to determine whether the dues could be enforced by threat of discharge under applicable union security agreements in compliance with Section 8(a)(3)(A) and 8(b)(2) of the NLRA. (1a-2a). Those sections allow unions to request the discharge of members failing "to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." *id.* The NLRB concluded that the dues requirements — which were the sole basis of petitioners' ineligibility —constituted a "permissible change in the periodic dues" structure and were therefore enforceable under valid union security clauses. (144a-146a) In addition, a federal district court held that the dues increase was implemented in accordance with the requirements of Section 101(a)(3) of the Landrum-Griffin Act. (3a); *Cole* v *Local 509, UAW,* (147a-158a). *All* UAW members — not only GM employees — were required to pay the increased dues, or face the possibility of discharge from employment pursuant to applicable union security agreements.

The UAW notified GM in November 1967 that there would be no GM strike. In December 1967, a new national GM-UAW agreement was reached and ratified, effective January 1, 1968. As is customary in the automobile industry, after reaching agreement on the national contract, local unions had the right to negotiate over matters of local concern. Appellants also ratified their local union agreements.

In late January 1968, local strikes began at three General Motors foundries — located in Saginaw, Michigan; Tonawanda, New York and Defiance, Ohio. The three foundry strikes were purely over local issues. These local issue strikes ultimately caused layoffs of some of the lower seniority employees at

approximately 24 Michigan GM plants. Appellants, who were among those laid off, filed unemployment insurance claims. Appellants were held by all agencies and courts to be "eligible" within MESA, because they were available for work, physically able to work, and were seeking work.[3]

General Motors sought to deny compensation benefits to appellants under the labor dispute qualification of MESA. The applicable part of Section 29(8) of MESA provides:

> (8) ***An individual shall be disqualified*** for benefits for ***any week with respect to which*** his total or partial ***unemployment is due*** to a labor dispute in active progress . . . in the establishment in which he is or was last employed, or to a *labor dispute* (other than a lockout) ***in active progress . . . in any other establishment within*** the United States ***which is functionally integrated*** with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.
>
> (a) For the purposes of this subsection 29(8), *no individual shall be deemed to be directly involved in a labor dispute unless* it is established that:
>
> * * *
>
> (ii) He is participating in or *financing* or directly interested in *the labor dispute which causes his total or partial unemployment.* The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph. (emphasis added)

All state agencies and courts held that appellants were not "participating" or "directly interested in" the three foundry strikes.

Some state agencies, and some state courts, including the Michigan Court of Appeals, however, disqualified appellants

---

[3]Michigan, as do all states, distinguishes between "eligibility" which the employee must establish and "disqualifications" which the employer must prove.

because they had "financed" the January 1968 foundry strikes when they had paid the dues increase in the fall of 1967.[4] The Michigan Court of Appeals held that the dues increase was irregular and a special assessment, thereby disqualifying appellants.

In 1980, the Michigan Supreme Court affirmed the lower court rulings on most of the state issues, reversed on some state issues, and remanded the case to the unemployment insurance Board of Review to determine whether the dues were sufficiently connected to the labor dispute to constitute "financing" of the dispute. The Court reserved the federal issues for its later ruling if necessary.

In June 1982, the Michigan Employment Security Board of Review issued a four opinion plurality decision on the state issue of "financing." Two Board members based their ruling of disqualification largely on the fact that appellants' union had maintained a strike fund and that appellants' dues had entered the strike fund. (99a-126a). The deciding vote was by the Board Chairperson. The chairperson concluded that the UAW's sixty-day notice — statutorily required by Section 8(d) of the NLRA — to GM to reopen its contract *in and of itself* gave rise to a disqualifying labor dispute:

> In this case, the *commonality that affected the workers at the three GM foundries and the claimants* in Michigan *was the sending of the sixty-day notice* that advised the employer that the national agreement would not be renewed. The national agreement is the tie that binds all the involved workers, and runs to all of them and their local contracts from the date of implementation to the date of its termination. (132a) (emphasis supplied)

On December 28, 1984, the Michigan Supreme Court affirmed

[4]The checkered procedural history included a favorable ruling by the Michigan Employment Security Commission, unfavorable rulings by the MESC Referee and Appeal Board, favorable rulings by Circuit Courts in Genesee and Wayne Counties, and an unfavorable ruling by a Circuit Judge in Ingham County, Michigan.

the Board on most of its rulings on the merits of the state issues.[5] (6a-51a).

After concluding that the dues increase "financed" a labor dispute within the meaning of MESA Section 29(8), the Michigan Supreme Court addressed the federal preemption issues. The Court adopted a two-step analysis. First, it held that there was in fact a conflict between the court's interpretation of MESA Section 29(8)(a)(ii), and the NLRA Section 7 right of an employee to form, join or assist labor organizations of their choice (61a-62a).

Next, the Court analyzed congressional intent to determine whether Congress intended to tolerate the conflict between the NLRA and MESA. Purporting to follow this Court's decision in *New York Telephone Company* v *New York State Department of Labor,*[6] but failing to make a crucial distinction relied on in that case, the Michigan Supreme Court concluded that the same legislative history discussed in *New York Telephone* indicated Congressional intent to tolerate state unemployment laws actually conflicting with the NLRA by disqualifying employees paying uniformly required union dues.

The Michigan Supreme Court then briefly discussed Appellants' other contentions. The Court held that MESA did not interfere with internal union decisions because "[i]t is clearly not the intent of MESA Section 29(8)(a)(ii) to do so." (69a). The Court also held that the disqualification was not a violation of appellants' First Amendment rights freely to associate. (69a-72a).

The Michigan Supreme Court denied rehearing on April 23, 1985. (143a) Appellants appeal from that denial of rehearing and from the Court's January 1985 decision.

[5]The Court affirmed the Board 3 to 3 on one state issue, which is not the subject of this appeal.

[6]440 U.S. 519 (1979).

I. THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning federal preemption of state unemployment compensation laws.[6a] As part of their unemployment compensation system, many states have enacted laws purporting to disqualify non-striking employees who "finance" a labor dispute causing their layoff. In the present case, Michigan has applied such a provision to disqualify union members who paid uniformly required union dues, even though the National Labor Relations Board ruled that the dues requirements at issue were lawful under federal labor law. (144a-146a).

The Michigan Supreme Court recognized that the Michigan statute, as applied, conflicted with the federally protected right to "form, join or assist labor organizations." 29 U.S.C. § 157. (61a-62a). And yet, the Michigan Supreme Court held that non-striking employees who paid these uniformly required dues had "financed" a labor dispute causing their layoff and were therefore ineligible for unemployment compensation. By interpreting state law to penalize employees for the exercise of the fundamental rights under Section 7 of the NLRA, the Michigan Supreme Court has "trenched on the employees' federally protected rights contrary to the Supremacy clause." *New York Telephone Co.* v *New York State Department of Labor,* 440 U.S. 519, 529 n.15 (1979). This Court should accept jurisdiction to correct the error of the Michigan Supreme Court and to provide authoritative guidance as to the scope of NLRA preemption of state "financing disqualification" laws.

A. THE MICHIGAN SUPREME COURT'S INTERPRETATION OF MESA SECTION 29(8)(a)(ii) ABRIDGES RIGHTS GUARANTEED BY THE NATIONAL LABOR RELATIONS ACT AND IS THEREFORE PREEMPTED BY DIRECT APPLICATION OF THE SUPREMACY CLAUSE.

As this Court has recently recognized, the clearest case for

[6a] This Court has recently agreed to review *Golden State Transport Co.* v *Los Angeles* (Case No. 84-1644) and *Gould* v *Wisconsin* (Case No. 84-1484). Both of those cases, as here, present questions of NLRA preemption of state regulatory activity.

NLRA preemption of state law occurs when the state law presents an "actual conflict" with the substantive rights protected under federal labor law. *Brown* v *Hotel and Restaurant Employees,* ____ U.S. ____, 104 S. Ct. 3179, 3186 (1984).

> If employee conduct is protected under §7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is preempted by direct application of the Supremacy clause. *Id.*

An impermissible "actual conflict" exists whenever "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objetives of Congress' " *Id.,* [quoting *Hines* v *Davidowitz,* 312 U.S. 52, 67 (1941)].

Under this distinct branch of the labor preemption doctrine[7] the crucial inquiry is whether the state law interferes with the exercise of rights protected by federal law. Inquiries into the magnitude of the state's interest in regulating the conduct and the extent of potential interference with the NLRB's primary jurisdiction are immaterial. *Brown* v *Hotel and Restaurant Employees, supra,* 104 S.Ct. at 3186-87. Simply stated, the NLRA "forecloses . . . state interference with the exercise of rights protected by §7 of the Act." *New York State Telephone, supra,* 440 U.S. at 528. See also, *Nash* v *Florida Industrial Commission,* 389 U.S. 235, 239-40 (1967); *Bus Employees* v *Missouri,* 374 U.S. 74, 81-82 (1963), *Bus Employees* v *Wisconsin Board,* 340 U.S. 383, 394 (1951); *Automobile Workers* v *O'Brien,* 339 U.S. 454, 458-59 (1950).

This Court has squarely held that one form of impermissible state interference with the protections of the NLRA is a state law denying eligibility for state unemployment compensation benefits because of an employee's exercise of rights guaranteed

[7] Two other branches of this doctrine — one preempting state regulation of conduct which Congress intended to be left unregulated and the other protecting the primary jurisdiction of the NLRB by preempting state laws regulating conduct arguably protected or prohibited by the NLRA — are also relevant here and are discussed fully in Parts B and C, *infra.*

by federal labor law. In *Nash* v *Florida Industrial Commission,* 389 U.S. 235 (1967), this Court unanimously held that the NLRA preempted Florida's interpretation of its "labor dispute disqualification" as requiring disqualification of persons who had initiated unfair labor practice proceedings against their employer. Speaking for the Court, Justice Blackman said:

> It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act . . . *Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits* from persons simply because they cooperate with the Government's constitutional plan. *Id.* at 239 (emphasis added).

Thus, *Nash* makes clear that the NLRA preempts state laws purporting to regulate, through denial of state unemployment compensation benefits, conduct protected by federal law.[8] *Nash* has recently been discussed with approval by this Court in both *New York Telephone* (*supra,* 440 U.S. at 529 n.15, 565 n.20) and *Brown* v *Hotel Employees* (*supra,* 104 S.Ct. at 3186).

1. It is clear that the right of an employee financially "to assist" a labor organization is protected by Section 7's broad protection of employee rights to "form, join or assist labor organizations." 29 U.S.C. §157 (1a). In addition, protection of the right to financially assist unions was viewed by Congress as crucial to achieving the NLRA's stated goals of eliminating employer-dominated and controlled labor organizations and

[8]The instant case actually presents an even more compelling basis for finding preemption than that presented in *Nash.* The Court there had to *imply* a federally protected right of access to the NLRB from the negative language of Section 8(a)(4) NLRA, which makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee for filing an unfair labor practice charge with the NLRB. The instant case involves an *express* Section 7 NLRA right financially to assit one's labor organization plus a similar implied right of financial assistance from NLRA Section 8(a)(3) and 8(b)(5).

assuring the financial independence of labor unions.[9] See S.Rep. 573, 74th Cong. 1st Sess., 8 (1935), H. Rep. 973, 74th Cong. 1st Sess., 16 (1935), 79 Cong. Rec. 7570, 74th Cong. 1st Sess. (1935) (remarks of Senator Wagner).

The Michigan Supreme Court in this case properly held that "§ 7 of the NLRA protects the right of employees to *financially* 'assist' their unions and . . . such protection is within the purpose of the NLRA." (61a) (emphasis in original). That Court also correctly found that "a conflict does in fact exist between the NLRA and [Section 29(8)(a)(ii) of] MESA." (62a). Thus the Michigan Supreme Court conceded the presence of both elements necessary to make out a case for NLRA preemption: (1) state interference or conflict (2) with a federally protected right. Under *Nash,* as approved in both *Brown* and *New York Telephone,* those findings alone mandate federal preemption of the conflicting state regulation.[10]

Not only does Michigan's interpretation of its unemployment law here conflict with the fundamental right of employees financially "to assist" labor organizations, Michigan's ruling also conflicts with the even more carefully protected and explicitly defined right of labor organizations to require under valid union security clauses that members pay, as a condition of employment, "the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(b)(2). (2a). As the NLRB explicitly found, the UAW was in this case exercising this federally-guaranteed

[9]Section 8(a)(2) of the NLRA, for example, makes it an unfair labor practice for an employer to provide financial support to labor organizations. 29 U.S.C. §158(a)(2).

[10]This Court has recently warned against preemption of state law where such preemption would "artificially *create* a no-law area." *Metropolitan Life Insurance Co.* v *Massachusetts,* 53 U.S. L.W. 4616, 4625 (June 3, 1985 [quoting *Taggart* v *Weinacker's, Inc.,* 397 U.S. 223 (1970) (concurring opinion)] (emphasis in original). A finding of preemption here poses no such risk of creating a "no-law" area. The law here is clear: employees have a federal right to financially assist labor organizations without fear of state interference.

right when it invoked the dues increase at issue here. (144a-146a) Thus, Michigan is directly penalizing — by withdrawing state benefits — the UAW and its membership for exercising rights carefully protected and defined by federal labor law.

As in *Nash*, Michigan's interpretation of state law impermissibly conflicts with substantive federal rights by forcing individuals and labor organizations into a "hard choice" between: (1) exercising their federal rights and being denied eligibility for state unemployment benefits; or (2) foregoing their federal rights in order to maintain eligibility for state benefits.

Instead of following *Brown* and *Nash*, the Michigan Supreme Court erroneously construed *New York Telephone*, engaged in its own evaluation of the same legislative history interpreted in *New York Telephone*, and mistakenly concluded that Congress intended to tolerate state unemployment compensation laws which withhold benefits from employees because those employees have exercised their federally protected right to pay uniformly required union dues.

The Michigan Supreme Court misconstrued *New York Telephone* by failing to recognize the crucial difference between preemption based on the protected nature of the regulated conduct and that based on an inferred Congressional intent to leave a certain category of conduct free from regulatory control altogether.

In *New York Telephone*, the Supreme Court upheld a state statute that permitted payment of unemployment compensation to strikers. The Court reiterated, however, that payment of unemployment compensation to striking workers did *not* entail "interference with employee rights protected by § 7 [of the NLRA]." 440 U.S. at 529. In addition, none of the opinions issued in *New York Telephone* questioned the validity of *Nash*. In the present case, unlike *New York Telephone*, the state *has restricted* claimants' Section 7 rights by basing their disqualification from unemployment compensation solely on the fact that they made lawful union dues contributions.

Failing to make this crucial distinction, the Michigan Supreme Court went on to examine the legislative history of the NLRA and the Social Security Act of 1935. The Court relied primarily on general Congressional statements regarding the states' latitude in constructing their own unemployment compensation systems. (65a-69a). Such evidence is undoubtedly of some value in cases such as *New York Telephone* presenting a question of inferred Congressional intent to tolerate a state law indirectly concerning conduct which Congress may have intended remain unregulated. Such evidence, however, falls far short of establishing a Congressional intent to tolerate an *actual conflict* between state regulation and the federally guaranteed right to "form, join or assist labor organizations" such as that in the present case.[11]

As the Michigan Supreme Court's opinion concedes, there is no evidence in the legislative history that Congress intended to permit a state to impinge on a worker's NLRA § 7 right to assist a union[12] (64a-65a). To extrapolate such a congressional purpose from the fact that Congress did intend to permit states to pay strikers under certain circumstances both contravenes the *New York Telephone* Court's interpretation of the same legislative history and expands state authority far beyond

---

[11] *Brown* v *Hotel Employees* is very instructive in this regard. As here, the Court in *Brown* was required to search for Congressional intent to tolerate an "actual conflict" between state regulation and §7 of the NLRA. The evidence in *Brown* included lengthy Congressional hearings bearing on the precise issue presented by the conflict as well as specific and express Congressional approval, pursuant to Article I, §10 of the U.S. Constitution, of a state regulation virtually identical to that before the Court in *Brown*. *Brown, supra* 104 S.Ct. at 3187-3190. See also, *De Veau* v *Braisted*, 363 U.S. 144 (1960).

[12] Indeed the plain language of the Social Security Act, now incorporated in the Internal Revenue Code, demonstrates that Congress, with the single exception of the issue of striker eligibility, specifically intended that states *not* be allowed to penalize employees for the exercise of federally protected rights. 26 U.S.C. § 3304(a)(5) (4a-5a). *See infra* at p. 19-20.

that which is necessary to establish and maintain an unemployment insurance system.

2. In addition to the fundamental federal right financially "to assist" unions and the carefully crafted federal right of unions to require dues payments as a condition of employment under the provisos to Sections 8(b)(2) and 8(a)(3), Michigan's interpretation of its unemployment compensation law is here in direct conflict with other federally guaranteed rights.

Not only does Michigan here impermissibly force employees to choose between paying lawful union dues or maintaining eligibility for state benefits, Michigan also is here using state law as an obstacle to union membership itself. In order to remain eligible for unemployment benefits, employees in Michigan are now required to refrain from paying uniformly required union dues. Employees failing to make timely payments of union dues, however, are subject to expulsion from the union. Thus, Michigan has impermissibly burdened the federal right to join and maintain membership in unions by forcing employees to choose between continued union membership and eligibility for state benefits.

By forcing employees to choose between union membership and state benefits, Michigan has also unconstitutionally burdened appellants' First Amendment right of freedom of association. Appellants' federally guaranteed right to join and maintain membership in a labor organization is a right protected from governmental interference by the First and Fourteenth Amendments to the Constitution of the United States, See, e.g., *American Federation of State, Co. & Mun. Emp.* v *Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin* v *Tilendis*, 398 F.2d 287 (7th Cir. 1968). MESA subsection 29(8)(a)(ii) as interpreted and applied by the Michigan Supreme Court burdens appellants' exercise of their First Amendment rights by disqualifying Appellants solely because they exercised their right to maintain their union membership by paying the increased dues

required of them as a condition of membership in the UAW.[13] *Cf. Sherbert* v *Verner*, 374 U.S. 398, 406 (1963).

A final and vivid example of Michigan's interference with federal rights is the decision of the chairperson of the Michigan Employment Security Board in the present case. She concluded that GM's and the UAW's exchange of the sixty-day notices of intent to terminate the national agreement *in itself* gave rise to a disqualifying labor dispute. (132a). The UAW was required by federal law to send that notice. 29 U.S.C. §158(d) (2a-3a). Thus, as in *Nash*, the Board Chairperson disqualified Appellants solely because they had availed themselves of an NLRA-protected right, here the right to bargain collectively.[14]

B. THE MICHIGAN SUPREME COURT'S INTERPRETATION OF SECTION 29(8)(a)(ii) MESA IMPERMISSIBLY INTERFERES WITH THE UAW'S RIGHT TO DETERMINE THE TIMING AND NATURE OF DUES INCREASES.

Not only does Michigan Supreme Court's ruling erroneously uphold the state's policy despite that policy's direct conflict with the important federal right to assist labor unions, through payment of lawful union dues, the Court's ruling also impermissibly intrudes on the union's right to manage its internal affairs — by freely determining the timing of dues increases and the uses to which dues money may be put — in contra-

---

[13]This Court has rejected a constitutional challenge to an Ohio unemployment law which disqualified claimants who were unemployed due to a labor dispute at another facility of the same employer. *Ohio Bureau of Employment Serv.* v *Hodory*, 431 U.S. 471 (1977). In *Hodory*, however, the applicable Ohio Statute did not apply solely to those who had "financed" a labor dispute, but applied to anyone who was laid off as a result of a labor dispute. This Court was careful to note that the challenged unemployment compensation law "does not involve any discernable fundamental interest or affect with particularity any protected class." 431 U.S. at 489. The *Hodory* Court also noted that no question of possible NLRA preemption was raised by claimants there. 431 U.S. at 475, note 3.

[14]The basis for the Chairperson's vote is critical because her opinion was the deciding vote of the state agency.

vention to Congress' clearly expressed intent to leave such conduct free from regulatory interference. By restricting a union's right to implement dues increases or direct dues revenues to a common "strike fund," Michigan further impedes appellants' right to engage in a protected form of self-help which Congress envisioned as crucial to the collective bargaining process.[15]

The test governing this branch of the preemption doctrine was first expressed in *Teamsters* v *Morton*, 377 U.S. 252, 259-260 (1964):

> If the [state] law . . . can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe . . . the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available." [quoted in *New York Telephone,* 440 U.S. at 530 n.18]

As this Court recently made clear in *New York Telephone*, this branch of the preemption doctrine must be applied whenever states — through their unemployment compensation laws — regulate aspects of employee, union or management conduct which Congress intended to remain unregulated. As the Court in *New York Telephone* said, in such situations "the crucial inquiry . . . is whether the exercise of state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the policies of the National Labor Relations Act." 440 U.S. at 531.

[15]The specter of this form of state intrusion on internal union decisions is not merely conjectural. A union, as here, faced with the possibility of a major or lengthy strike must evaluate its ability to sustain the strike by paying "strike benefits" to striking members. To buttress its ability to engage in an effective strike, the union will often seek to increase contributions to its "strike fund" either by increasing dues or redirecting current cash flow to the strike fund. Michigan's interpretation of its state law would, if upheld, obviously provide a significant disincentive for unions to engage in this form of self-help by imposing the risk that laid-off non-striking members otherwise eligible for unemployment benefits would be disqualified because of their "financing" the labor dispute. In short, Michigan's interpretation of the statute impermissibly constrains the internal union decision-making process by threatening to penalize the union and its members should the union engage in the type of self-help pursued by the UAW here.

In *New York Telephone* this Court upheld the state statute in question only because the legislative history of the Social Security Act showed that Congress specifically intended to permit states to pay unemployment benefits to strikers. 440 U.S. at 540 (Stevens, J.) (plurality opinion); 440 U.S. at 547 (Brennan, J.) (concurring opinion); 440 U.S. at 547 (Blackmun, J.) (concurring opinion). The extensive legislative history cited by the Court dealing with the narrow question of striker eligibility does not suggest that Congress wished to permit state unemployment insurance systems to intrude into other areas of federal labor policy. In the present case, the issue is not whether the states may pay unemployment compensation to strikers, but rather whether the states may intrude upon union decisions regarding the assessment of dues from union members who do not strike.

In contrast to the situation in *New York Telephone*, there is no evidence that Congress intended to permit the type of state interference at issue here. On the contrary, there is extensive evidence that Congress has repeatedly "focused on" the conduct as issue here — internal union decisions regarding dues — and has each time concluded that, to effectuate federal labor policy, such conduct should remain unregulated and instead be "governed only by the free play of economic forces." *New York Telephone*, 440 U.S. at 531. State attempts to regulate this very same conduct, therefore, "frustrate effective implementation" of national labor policy and must be preempted. *Id.*[16]

[16]The decision of the Michigan Supreme Court also intrudes on another area of internal union policy: affiliation. Were petitioners and the striking Local Unions not affiliated with the same International Union, petitioners would not have been in fear of losing their unemployment benefits. Thus, unions deciding issues of affiliation or structuring umbrella coalitions of constituent bodies will now be forced to take into account the effect of such affiliations on the potential eligibility of non-striking members who pay required dues to the umbrella organization.

It is by now a truism that Congress intended the "internal affairs" of labor organizations be free from regulatory intrusion. See, *e.g., NLRB* v *Allis Chalmers,* 388 U.S. 175 (1967). Recently, in *Pattern Makers* v *NLRB,* this Court again reaffirmed this principal. In holding that the NLRB may prohibit union rules restricting the rights of members to resign, the Court relied on the distinction between *internal* union rules — such as those dealing with fines for current members — and union rules having an *external* effect by restricting the rights to refrain from membership altogether. 53 U.S. L.W. 4928, 4930 (June 27, 1985). Union rules regarding the timing, amount, or use of membership dues are clearly "internal" union rules.

Potential regulation of the timing and nature of dues increases has in fact received Congressional scrutiny several times and each time Congress has concluded that such regulation would constitute unwarranted interference with the internal affairs of unions.

The 1947 House bill to amend the National Labor Relations Act, for example, contained a provision which would have allowed federal regulation of union dues. H.R. 3020, as it passed the House, would have amended Section 7 of the Act by the addition of Section 7b, providing:

> Members of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization . . . H.R. 3020, 80th Cong., 1st Sess., (1947), I Legislative History of The Labor Management Relations Act, 1947 [hereafter Leg. Hist.] at 176.

As enacted, the Labor Management Relations Act of 1947 deleted Section 7(b) of the House bill altogether. Congress also refused to enact a provision of the House bill which would have regulated the amount of union dues and assessments. *See* Leg. Hist. at 179-180. Only the provision regulating initiation fees was included in Section 8(b)(5) of the Act. That provision, as enacted, provided simply that a union could not require an excessive or discriminatory *initiation fee* from employees covered by a union security agreement permitted under Section 8(a)(3) of the statute. [17] Even Section 8(b)(5) met strong criticism as being too intrusive. Senator Taft, defending the bill, repeatedly stressed that the provision was meant only to prevent unions from barring access to a trade through a combination of high initiation fees and the union shop, and was not intended to regulate dues or other internal union affairs. *See* 93 Cong. Rec. 6601, 6662 (Daily Ed.), Leg. Hist. at 1540, 1579. Thus, Congress, faced with legislation which would have regulated the amount of union dues and assessments, rejected those proposals and decided only to regulate initiation fees under limited circumstances.

In the 1959 Landrum-Griffin Amendments to the NLRA, Congress again "focused on" internal union decisions regarding dues and chose to regulate only the *procedures* by which unions could implement dues increases. 29 U.S.C. § 411(a)(3). That statute purposefully contains no substantive limitations on the amount of dues or on a union's right to allocate dues moneys to such funds or purposes as the union deems advisable. There is no question but that the increase in dues at issue here was made in accordance with these procedural requirements. *Cole* v *Local Union No. 509 UAW, supra* (147a-158a).

Contrary to the Michigan Supreme Court's holding here, the Social Security Act provides no evidence of Congressional intent to allow the states to regulate what Congress has repeatedly decided should remain unregulated. In fact, the Social Security Act, with the single and notable exception of striker eligibility, indicates an intent to assure that the states

---

[17] Section 8(b)(5) of the Act now provides:

> It shall be an unfair labor practice for a labor organization or its agents —
> (5) To require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances . . . 29 U.S.C. § 158(b)(5).

not be allowed to frustrate the purposes of the NLRA through application of unemployment insurance laws. 26 U.S.C. § 3304(a)(5) provides:

> Compensation shall not be denied . . . to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> * * *
>
> (C) . . . as a condition of being employed the individual would be required to join a company union or to resign from or refrain holding membership in any bona fide labor organization.[18]

As Senator Wagner explained in the Hearings on the Social Security Act, this provision prohibited states from denying benefits to any worker "because he refuses to accept . . . as a condition of employment any interference with his right of self-organization." Sen. Comm. on Finance, Hearings on Economic Security Act, S. 1130, 74th Cong., 1st Sess., 5 (1935).[19]

Thus the language of Section 3304(a)(5) and the history of that provision show that Congress specifically intended that states not be permitted to use unemployment compensation statutes to penalize employees for exercising their federally protected rights to "form, join or assist labor organizations."

Far from establishing Congressional intent to tolerate the type of state regulation at issue here, the Social Security Act, along with the NLRA and Landrum-Griffin, demonstrate convincingly that Congress has concluded that State regulation of internal union decisions regarding dues must yield to the strong federal policy protecting such internal union decisions from regulatory interference.

---

[18]This language was originally included in the Social Security Act of 1935 but is now incorporated in the Internal Revenue Code. See 49 Stat. 640.

[19]See also, Report of the Committee on Economic Security, reprinted in Hearings on S. 1130 before the Committee on Finance of the United States Senate, 74th Cong., 1st Sess., 1311, 1229 (1935).

C. THE MICHIGAN SUPREME COURT'S INTERPRETATION OF MESA SECTION 29(8)(a)(ii) IMPERMISSIBLY INTRUDES ON THE PRIMARY JURISDICTION OF THE NLRB.

The final branch of the preemption doctrine relevant to the present case is that branch designed to protect the primary jurisdiction of the NLRB by preempting state regulation of conduct which is either "arguably protected or arguably prohibited" by federal labor law. See *San Diego Building Trades Council* v *Garmon*, 359 U.S. 236, 244-247 (1959). The evil sought to be avoided here is not that the states will regulate conduct actually protected or that they will regulate conduct which Congress intended should remain unregulated. Rather, the evil here is that states will defeat the purposes of Congress by asserting regulatory jurisdiction over conduct which is also subject to NLRB scrutiny, thereby impermissibly "allowing two law-making sources to govern" the same conduct. *Garmon*, 359 U.S. at 247. In the present case Michigan has improperly involved itself in a determination of whether the dues at issue constituted periodic dues or a special assessment — an issue that was properly also subject to NLRB scrutiny here.

This Court has spoken many times since *Garmon* on this branch of the preemption doctrine. See, *e.g., Sears* v *Carpenters*, 436 U.S. 180 (1978), *Farmer* v *Carpenter*, 430 U.S. 290 (1977), *Operating Engineers* v *Jones*, 460 U.S. 669 (1983).

The policy animating this branch of the preemption doctrine was recently restated by this Court:

> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be avoided. *Sears, supra*, 436 U.S. at 187-188 [quoting *Garmon*, 356 U.S. at 245].

In some instances, this policy favoring preemption must yield in the face of state regulation of conduct "deeply rooted in local feeling" See *Operating Engineers* v *Jones*, 460 U.S. at 676.

In applying this exception, "the critical inquiry ... is ... whether the controversy presented to the state court is identical to ... or different from ... that which could have been ... presented to the Labor Board." *Sears,* 436 U.S. at 197.

In *Operating Engineers* v *Jones,* this Court further developed this "similarity of the inquiry" test for determining preemption under *Garmon.* In that case a discharged supervisor had sued the union in state court for wrongful interference with contractual relations. The supervisor had also previously attempted to bring unfair labor practice charges before the NLRB but the Board had refused to issue a complaint or pursue the claims. This Court held that the supervisor's state law claims were preempted under *Garmon* because they would require that the state court determine whether the union caused the discharge. The Court noted that the issue of causation would also be a "crucial element" in any unfair labor practice proceedings and indeed the issue of causation would be "recurringly at the core of [similar unfair labor practice] cases." 460 U.S. at 682-683. For this reason, the Court held that the state court action was not of "only peripheral concern to federal labor policy" and therefore must be preempted.

The Court in *Jones* also distinguished prior cases holding that the matters before state court and the NLRB were sufficiently distinct to avoid preemption. In *Sears,* for example, the state court action for trespassory picketing would involve only an inquiry into the *location* of the picketing. "The unfair labor practice charge, however, would have focused on whether the picketing had recognitional or work reassignment objectives, issues 'completely unrelated to the simple question of whether a trespass had occurred.' " *Jones,* 460 U.S. at 682-683 [quoting *Sears,* 436 U.S. at 198.] Similarly, in *Linn* v *Plant Guard Workers* 383 U.S. 53 (1966) (malicious libel) and *Farmer* v *Carpenters, supra* (intentional infliction of emotional distress), this Court found that the state court action raised issues sufficiently severable from the potential NLRB inquiry that

the dangers of overlapping jurisdiction did not warrant preemption.

The present case, in contrast, has involved both the Michigan Courts and the NLRB in an inquiry into precisely the same conduct — dues increases — and has required that both the Michigan Courts and the NLRB examine those increases to determine whether the increased dues constituted "regular" or "periodic" dues or a "special tax or assessment."

Under the provisos to Sections 8(b)(2) and 8(a)(3) of the NLRA, unions are allowed to request, under the terms of a valid union security agreement, the discharge of employees failing to "tender the periodic dues and initiation fees uniformly required as a condition of acquiring and retaining membership." 29 U.S.C. §§ 158(a)(3)(B) and 158(b)(2). (1a-2a) See *NLRB* v *GM,* 373 U.S. 734 (1963). In determining whether unions have committed unfair labor practices under § 8(a)(3), then, the NLRB must decide, as a "crucial element" of such cases, whether the dues or payments required by the union constituted "periodic dues ... uniformly required." Indeed the NLRB has developed an extensive body of law on this issue and has generally made distinctions between "regular" or "periodic" dues and "special assessments." See *e.g., NLRB* v *Food Fair Stores,* 307 F.2d 3 (3rd Cir. 1962); *Carpenters, Local 455,* 271 NLRB No. 179, (1984); *Teamsters Local 959,* 167 NLRB 1042 (1967); *ACF Industries,* 245 NLRB 339, *enf'd as mod. sub. nom Brotherhood of Railway Carmen* v *NLRB,* 624 F.2d 819 (8th Cir. 1980).

The Michigan Supreme Court was likewise here called upon to determine whether the increased dues at issue constituted "regular" or "periodic" dues or were rather a "special assessment." While disqualifying employees who "finance" a labor dispute causing their unemployment, MESA also provides "[t]he payment of *regular union dues* ... shall not be construed as financing a labor dispute." MESA § 29(8)(a)(ii) (3a-4a) (emphasis supplied).

Although the Michigan Supreme Court failed to adapt plaintiff's argument that the word "regular" in MESA should be construed synonomously with the word "periodic" as used in § 8(b)(2) of the NLRA, (91a-93a), the impermissible overlap of these inquiries is apparent. After lengthy examination of the dues increase at issue, the Michigan Supreme Court concluded:

> The emergency dues provided by the amendment constituted a *marked deviation from the regular pattern of dues collection;* they were a *temporary emergency measure* whose obvious purpose was to replenish the union strike fund. The Court of Appeals correctly concluded that these payments could not be considered 'regular' (94a-95a). (emphasis supplied).

In making its determination under § 8(b)(2), the NLRB has adopted a test first enunciated by the Third Circuit in *Food Fair Stores:*

> It is clear that the term "periodic dues" in the usual and ordinary sense means the *regular payments* imposed for the benefits to be derived from membership *to be made at fixed intervals* for the maintenance of the organization. An assessment, on the other hand, is a charge levied on each member in the nature of a tax or some other burden for a special purpose, *not having the character of being susceptible of anticipation as a regularly recurring obligation as in the case of "periodic dues."* (emphasis supplied).

Carpenters Local 455, supra, 117 LRRM (BNA) at 1082, [quoting *NLRB* v *Food Fair Stores,* 307 F.2d at 11.] (emphasis supplied).

This obvious overlap of inquiries was also illustrated in the present case. The NLRB, responding to unfair labor practice charges filed by various UAW members, concluded that the increased dues at issue "did not constitute a 'special tax' or assessment but constituted rather a permissible change in 'periodic dues' within the meaning of the Section 8(a)(3)

proviso." (144a). The Michigan Supreme Court has thus impermissibly intruded on the primary jurisdiction of the NLRB in contravention to *Garmon* by basing the denial of unemployment compensation benefits on factors which form a "crucial element" of the NLRB's inquiry into precisely the same conduct.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

FRED ALTSHULER
Altshuler & Berzon
Suite 600, 117 Post Street
San Francisco, CA 94108
(415) 421-7151
JORDAN ROSSEN
(Counsel of Record)
RICHARD W. McHUGH
DANIEL W. SHERRICK*
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216
Counsel for Appellants

*Substantial work on this appeal was done by Carol Slezak, a third year student at the University of Richmond Law School, as supervised by Appellants' counsel.

APPENDIX

INDEX TO APPENDIX

APPENDIX A
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment, United States Constitution, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

Section 7 of the National Labor Relations Act, 29 USC § 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(3) of the National Labor Relations Act, 29 USC § 8 158(a)(3), provides:

It shall be unfair labor practice for an employer —

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization

is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, . . . *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b)(2) of the National Labor Relations Act, 29 USC § 158(b)(2), provides:

It shall be an unfair labor practice for a labor organization or its agents—

* * *

(2) to cause or attempt an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining memberships.

Section 8(d) of the National Labor Relations Act, 29 USC § 158(d), provides in part:

where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such

contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

Section 101(a)(3), Landrum-Griffin Act, 29 USC § 411(a)(3), provides:

[The] rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

* * *

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board of similar governing body shall be effective only until the next regular convention of such labor organization.

Section 29(8)(a)(ii), Michigan Employment Security Act, Mich. Comp. Laws § 421.29 (8)(a)(ii), provides:

(8) Labor dispute. An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by that labor dispute, in the establishment in which he is or was last employed, or to a labor dispute, other than a lockout, in active progress, or to shutdown or start-up operations caused by that labor dispute, in any other establishment within the United States which is

functionally integrated with the establishment and is operated by the same employing unit. An individual's disqualification imposed or imposable under this subsection shall be terminated by his performing services in employment with an employer in at least 2 consecutive weeks falling wholly within the period of his total or partial unemployment due to the labor dispute, and in addition by earning wages in each of those weeks in an amount equal to or in excess of his actual or potential rate with respect to those weeks based on his employment with the employer involved in the labor dispute. An individual shall not be disqualified under this subsection if he is not directly involved in the dispute.

(a) Same; criteria for determining involvement. For the purposes of this subsection an individual shall not be deemed to be directly involved in a labor dispute unless it is established that:

* * *

(ii) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute within the meaning of this subparagraph . . .

26 USC § 3304(a)(5) provides:

(a) Requirements.—The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that—

* * *

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work

offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

BAKER v GENERAL MOTORS CORPORATION (AFTER REMAND)
COLLIER v GENERAL MOTORS CORPORATION (AFTER REMAND)
SEIDELL v GENERAL MOTORS CORPORATION (AFTER REMAND)

Docket Nos. 59861-59863. Argued June 9, 1983 (Calendar No. 3). — Decided December 28, 1984. Released January 17, 1985.

* * *

AFTER REMAND

RYAN, J. The issues in this case are whether the plaintiffs were properly disqualified under MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii) from receiving unemployment benefits for "financing" the labor dispute which caused their unemployment and whether, if the plaintiffs were properly disqualified for "financing," MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii) is invalid as violative of the Supremacy Clause of US Const, art VI, cl 2 or of the First Amendment right to freedom of association. These issues arise in the context of the following facts.

On September 6, 1967, the United Automobile Workers contract with General Motors expired. Prior to its expiration, UAW members at GM had overwhelmingly authorized a strike. However, the UAW did not choose GM as its "target" company. Instead the UAW called a national strike against the Ford Motor Company beginning on September 7, 1967. On October 2, 1967, the UAW called a national strike against the Caterpillar Tractor Company. However, work at GM continued without interruption during this entire time.

In early October, 1967, faced with stalemated bargaining at Ford and Caterpillar, the UAW called a special national UAW convention for October 8, 1967. The stated purpose of the special convention, according to the "UAW Proceedings,"[1] was threefold:

"PURPOSE OF CONVENTION

"The Special Convention is being held to:

"1. Review the status of our 1967 collective bargaining effort.

"2. To consider revision of the dues program of the International Union, UAW, to provide adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort.

"3. To consider revisions of the Constitution of the International Union as it relates to the payment of dues, strike fund, membership eligibility, strike insurance program and other matters related to emergencies facing the International Union, UAW."[2]

During the one-day special convention, the UAW amended Article 16 of its constitution to allow strike fund dues to be increased. Amended Article 16 read (in pertinent part) as follows:

"Article 16.

"Section 2(a)(New):

"Emergency Dues

"All dues are payable during the current month to the financial secretary of the local union.

"Commencing with the eighth (8th) day of October, 1967, until October 31, 1967, and for each month thereafter during the emergency as defined in the last paragraph of this subsection, union administrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be as follows:

---

[1]The "UAW Proceedings" was the UAW's official published report of the special convention. The "UAW Proceedings" will hereafter be referred to simply as the Proceedings.

[2]Plaintiffs' Appendix, p 487a.

"1. For those working in plants where the average straight time earnings * * * is three dollars ($3.00) or more, *twenty-one dollars and twenty-five cents* ($21.25) *per month.*

"2. For those working in plants where the average straight time earnings * * * is less than three dollars ($3.00), *eleven dollars and twenty-five cents* ($11.25).

* * *

"This schedule of dues shall remain in effect during the current collective bargaining emergency as determined by the International Executive Board and thereafter, if necessary, until the International Union Strike Insurance Fund has reached the sum of twenty-five million dollars ($25,000,000), at which time the dues structure established in 2(b) below, shall become effective."[3] (Emphasis added.)

Prior to the amendment of Article 16, each UAW member paid strike insurance dues of $1.25 per month and administrative dues of $3.75. Therefore, the amendment to Article 16 increased member's strike fund dues by 800% or 1,600%.[4]

The national strikes at Ford and Caterpillar ended before the first collection of the new special strike fund dues in

[3]*Baker v General Motors Corp,* 409 Mich 639, 651-652, fn 4; 297 NW2d 387 (1980).

During the same convention, § 10(a) of Article 16 was amended to provide as follows:

"Section 10(a)(New): During the emergency set out in Section 2(a), from each member's union administrative dues, each local union must remit a monthly per capita tax of one dollar and seventy-five cents ($1.75) and the local union shall retain two dollars ($2.00).

"In each month, each local union must remit the full amount of Union Strike Insurance Fund dues to the International Union, such dues to be placed in the International Union's Strike Insurance Fund. The member's monthly per capita tax and Strike Insurance Fund dues shall be forwarded to the International Secretary-Treasurer.

"One dollar ($1.00) of each reinstatement fee shall be forwarded to the International Secretary-Treasurer * * *."

[4]The amount of the increase depended upon the "average straight time" hourly wages at the UAW member's plant.

October, 1967.[5] Nevertheless, the new emergency strike fund dues were collected from the UAW membership in October and November, 1967. Since there was no contract at GM until December 15, 1967, the dues were collected "by hand" by union stewards and not by GM through an automatic checkoff system.

In January and February, 1968, UAW members at GM foundry plants in Michigan, Ohio and New York went on strike over disputed local issues. In accordance with UAW regulations, the striking GM foundry plant workers were paid strike benefits from the UAW's International Union Strike Insurance Fund (SIF). Due to the GM foundry plant strikes, work shortages developed at non-striking GM plants. As a result of these work shortages, GM laid off the plaintiffs[6] in early 1968.

Following their layoff, the plaintiffs filed unemployment compensation claims with the Michigan Employment Security Commission. GM opposed these claims. GM asserted that the plaintiffs were disqualified from receiving unemployment benefits because they had "financed" the labor dispute which caused their unemployment by paying the emergency strike fund dues. GM cited the Michigan Employment Security Act § 29(8), which stated (in pertinent part):

> "(8) An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a

[5]The Ford strike ended October 22, 1967. The Caterpillar strike ended October 25, 1967. The majority of the Board of Review found that the increase was not needed for the Ford strike.

[6]Plaintiffs are all members of the UAW and employees at GM plants in Michigan. All plaintiffs paid the emergency strike fund dues authorized at the UAW Special Convention in October, 1967.

lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.

"(a) For the purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:

* * *

"(ii) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph * * *" MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii).

Over GM's objections, the MESC approved plaintiffs' claims.

GM appealed the MESC decision to a hearing referee who reversed the MESC and disqualified the plaintiffs from unemployment benefits since they had "financed" the labor dispute which caused their unemployment by paying the emergency strike fund dues. The plaintiffs appealed the referee's decision to the Michigan Employment Security Appeal Board which affirmed the referee's decision that the plaintiffs were disqualified from benefits under the "financing" provision of MESA § 29(8) by their payment of emergency strike fund dues. The plaintiffs then appealed to three circuit courts. Two of the circuit courts reversed the appeal board's decision, while one affirmed the appeal board's decision. On appeal, the Court of Appeals held that the plaintiffs had "financed" the labor dispute which caused their unemployment by paying emergency strike fund dues and that they were, therefore, disqualified under

MESA § 29(8)(a)(ii). *Baker v General Motors Corp,* 74 Mich App 237; 254 NW2d 45 (1977).

After granting leave to appeal, this Court decided three issues. *Baker v General Motors Corp,* 409 Mich 639; 297 NW2d 387 (1980). First, the Court determined that the plaintiffs' unemployment was "due to a labor dispute in active progress" and was not due to the GM/UAW seniority system. Second, the Court determined that the amended strike fund dues paid by the plaintiffs in October and November, 1967, were not "regular union dues," but rather were extraordinary emergency dues. Third, the Court determined that, while the dues were not ordinary, the payment of extraordinary dues did not automatically disqualify the plaintiffs from receiving unemployment compensation. For extraordinary or emergency dues to disqualify the plaintiffs, the "financing" through the payment of non-ordinary dues must have a "meaningful connection" to the labor dispute which caused the plaintiffs' unemployment. To determine whether a "meaningful connection" existed in this case, the Court remanded the case to the Board of Review[7] for further proceedings to determine "whether plaintiffs' emergency dues payments were sufficiently connected with the local labor disputes which caused their unemployment to constitute 'financing' of those labor disputes." *Baker, supra,* p 668.

On remand, the Board of Review conducted hearings on June 2, 3, and 22, September 15, and October 13, 1981. At the completion of the October 13 hearing, the board closed the record to further evidence. However, during final arguments on December 8, 1981, the board reopened the record (over plaintiff's objection) to allow GM to place in evidence the "Proceedings" of the 1967 UAW special convention which amended Article 16 to require the "emergency" dues and newspaper clippings about UAW officials' statements and

---

[7]The Board of Review is the successor to the appeal board.

actions in 1967 and 1968. The board, by a 3-2 plurality, issued a decision holding that a "meaningful connection" existed between the payment of the emergency dues and the labor dispute which casued the plaintiffs' unemployment. Therefore, the Board of Review denied plaintiffs unemployment benefits under MESA § 29 (8)(a)(ii).

Since we had retained jurisdiction, the case returned to this Court. We affirm the judgment of the Board of Review and hold that a "meaningful connection" existed between the emergency dues and the local GM foundry strikes which caused the plaintiffs' unemployment. Additionally, we hold that MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii) does not violate the Supremacy Clause of the federal constitution since the financing of labor disputes is "conduct touch[ing] interests so deeply rooted in local feeling and responsibilty that * * * we could not infer that Congress had deprived the states of the power to act," *San Diego Building Trades Council v Garmon,* 359 US 236, 244; 79 S Ct 773; 3 L Ed 2d 775 (1959), and since Congress has stated its intention to tolerate a "financing" disqualification to unemployment benefits. Finally, we hold that MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii) does not place unconstitutional burdens upon the plaintiffs' First Amendment rights of association.

I

In deciding the issues by the plaintiffs, it is necessary to understand the role of MESA § 29(8) in relation to the entire act and in relation to labor-management relations. Therefore, we begin with an overview of the MESA.

The MESA is Michigan's response to the Social Security Act of 1935, 49 Stat 620; 42 USC 301 *et seq.*, which provides for federal funding to states with state unemployment insurance programs. In defining eligibility for unemployment benefits, the MESA limited benefits to persons who are involuntarily unemployed. As the Legislature stated in the MESA's policy section:

> "Sec. 2. The legislature acting in the exercise of the police power of the state declares that the public policy of the state is as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. *Involuntary unemployment* is a subject of general interest and concern which requires action by the legislature to prevent its spread and to lighten its burden which so often falls with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state. Social security requires protection against this hazard of our economic life." MCL 421.2; MSA 17.502. (Emphasis supplied.)

This Court recognized that the MESA is intended to benefit only those involuntarily unemployed. *I M Dach Underwear Co v Employment Security Comm*, 347 Mich 465, 472; 80 NW2d 193 (1956): "[c]learly the act was intended primarily for the benefit of those involuntarily unemployed." We have, therefore, interpreted the MESA in light of its stated purpose of not providing benefits to persons who are "voluntarily" unemployed.

Since the MESA is intended to provide benefits only to involuntarily unemployed persons, the purpose of § 29 is obvious. MESA § 29 lists the circumstances under which the Legislature holds that a person is not entitled to benefits under the MESA because he is *not* involuntarily unemployed. Subsection 8 of MESA § 29 specifically discussed labor disputes Section 29(8), as applicable to this case, states that a worker is *not* involuntarily unemployed if his unemployment is due to a labor dispute in an establishment within the United States which is functionally integrated with his employment and *which was "financed" by the unemployed person.*

In our earlier decision, we determined that the plaintiffs' unemployment was due to a labor dispute in an establishment within the United States which was functionally integrated with that of the plaintiffs place of employment. However, we

did not resolve whether the plaintiffs were disqualified from unemployment benefits because their unemployment was due to their "financing" of a local labor dispute. We held that "financing" required a "meaningful connection" between the payment of non-ordinary strike fund dues and the local labor dispute which caused the plaintiffs' unemployment. A "meaningful connection" between the financing and the labor dispute which caused the plaintiffs' unemployment was required since a person is "voluntarily" unemployed under MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii) only if he is "directly involved" in the labor dispute which causes his unemployment. We remanded the case to the Board of Review for a determination of whether such a meaningful connection existed showing that the plaintiffs were "directly involved" in the labor dispute which caused their unemployment.

With this brief background, we turn our attention to determining whether there is a "meaningful connection" between the plaintiffs' financing by payment of emergency strike fund dues and the labor dispute which caused their unemployment.

II

The first assignment in determining whether the plaintiffs' financing has a "meaningful connection" to the labor dispute which caused their unemployment is to define what is meant by a "meaningful connection." Since this is an issue of first impression, we shall consider the parties' and the Board of Review members' recommended definitions of "meaningful connection."

A

Not surprisingly, the plaintiffs and the defendants do not agree upon what elements properly should be included in the definition of "meaningful connection." Even where the parties agree on a given element of the definition of "meaningful connection," they disagree on whether the element is established in this case.

The plaintiffs ask the Court to define "meaningfully connected" as follows: there is a meaningful connection between the labor dispute which caused the claimant's unemployment and the claimant's financing if the claimant voluntarily, directly, and in significant amounts funded the labor dispute which caused the claimant's unemployment for the purpose of assisting the labor dispute, and with the intention that he personally benefit from the "success' of the labor dispute. This proposed definition has six elements. First, the financing must be "voluntary." The plaintiffs argue that the financing in this case was involuntary since they were required to make the payments or be subject to dismissal for not being UAW members in good standing. Second, the financing must involve a direct payment from the plaintiffs to those involved in the labor dispute. The plaintiffs argue that the financing in this case was not direct but rather was all accomplished through the UAW's SIF. Third, the financing must be in significant amounts. The plaintiffs argue that the financing in this case was only $20 or $40 per plaintiff which is *de minimis* and insignificant. Fourth, the financing must occur contemporaneously with the labor dispute. The plaintiffs argue that the financing in this case occurred in October and November, 1967, while the labor dispute occurred in January and February, 1968. Fifth, the financing must be for the purpose of assisting the particular labor dispute which caused the plaintiffs' unemployment. The plaintiffs argue that the financing in this case was not for the purpose of supporting the particular local labor disputes which caused their unemployment, but rather was for the purpose of supporting national strikes against Ford and Caterpillar. Finally, financing must include the intention that the plaintiffs benefit from the resolution of the labor dispute issues in favor of the supported side. The plaintiffs argue that the local labor dispute issues did not affect the plaintiffs and that they had no intention of benefiting from the success of the labor disputes. Therefore, the financing in this case was

remote rather than "meaningfully connected" to the labor dispute which caused the plaintiffs' unemployment. Since no aspect of the meaningful connection definition is satisfied by the plaintiffs' actions, the Board of Review's determination that the plaintiffs were disqualified from receiving unemployment benefits was erroneous.

The defendant, on the other hand would define "meaningful connection" as follows: there is a meaningful connection between the labor dispute which caused the claimant's unemployment and the claimant's financing if the claimant paid any non-ordinary dues for the purpose of supporting labor disputes which forseeably included the labor dispute that caused the claimant's unemployment. This proposed definition had four elements. First, the claimant must have paid non-ordinary dues. The defendant notes that we held in *Baker, supra*, that the dues paid in this case were extraordinary and all plaintiffs admit paying such dues. Second, the purpose of the non-ordinary dues must have been to support labor disputes. The defendant claims that the dues in this case were intended to support labor disputes since they were paid to the UAW's SIF. Third, the supported labor disputes must foreseeably include the labor dispute that caused the claimant's unemployment. The defendant claims that local GM strikes were foreseeable. Finally, those involved in the labor dispute must receive benefits from the extraordinary dues payments. The defendant claims that nearly half of the SIF strike benefits paid to the striking GM foundry workers were from the payment of the emergency dues authorized at the UAW special convention. Therefore, there is a "meaningful connection" between the plaintiffs' emergency dues payments and the strike that caused their unemployment; consequently, the Board of Review properly disqualified the plaintiffs under MESA § 29(8)(a)(ii).

B

No Board of Review member adopted either of these tests *in toto*. Instead, each member adopted only certain elements from the suggested lists, and the board members were unable to agree upon a single "meaningful connection" definition. Each definition was an attempt to follow the guidance which we had given in *Baker, supra*, p 668:

> "While the statute does not require that payments made by individuals whose disqualification is in issue be traced into the hands of workers involved in the labor dispute which caused the individuals' unemployment, the term 'financing' suggests a meaningful connection between the payment or class of payments said to constitute financing and the labor dispute allegedly financed."

We shall review each proposed definition individually.

1. *Test Applied by Members Viventi and Cohl*

For members Viventi and Cohl, a "meaningful connection" existed if the claimant's extraordinary dues payment involved significant amounts, was made at approximately the time of the labor dispute that caused the claimant's unemployment and was made for the purpose of supporting labor disputes which foreseeably included the labor dispute which caused the claimant's unemployment.

The first part of the Viventi/Cohl meaningful connection definition held that a meaningful connection existed only where the amount of financing through the payment of extraordinary dues was "substantial." If the amount of financing by payment of extraordinary dues was not "substantial," there was no meaningful connection between the financing and the labor dispute that caused the plaintiffs' unemployment. After noting that this Court did not require that "payments made by individuals whose disqualification is in issue be traced into the hands of workers involved in the labor dispute which caused

the individuals' unemployment,"[8] members Viventi and Cohl found that the emergency dues paid in this case were in "substantial" amounts when one considered the effect of all the payments. They supported this conclusion with the following findings:

1) Each plaintiff paid $10 or $20 per month in emergency dues.

2) The UAW raised $42 million in two months through the emergency dues. That amount essentially equaled the amount of the UAW's entire strike fund prior to the institution of emergency dues.

3.) The $10 or $20 increase in UAW dues constituted an 800% or 1600% increase in each plaintiff's strike fund dues.

4) The foundry strikers received $247,000 from the UAW strike fund.

5) The 19,000 claimants alone contributed somewhere between $380,000 and $760,000 through emergency dues payments.

6) At the time the January, 1968, payments began to the striking foundry workers, 53% of the fund was from regular dues payments while 47% of the fund was from emergency dues payments. When the February, 1968, payments were made, 51% of the fund was from regular dues payments while 49% of the fund was from emergency dues payments.

The second part of the Viventi/Cohl meaningful connection definition held that a meaningful connection existed only where the claimants' financing occurred at approximately the same time as the labor dispute that caused the claimant's unemployment. If there was no temporal proximity between the emergency dues payments and the payment of strike benefits to the strikers engaged in the local GM strike that caused the plaintiffs' unemployment, there was no meaningful connection between the plaintiffs' emergency dues payments and the labor dispute that caused the plaintiffs' unemployment.

[8] *Baker, supra*, p 668.

However, according to members Viventi and Cohl, the timing of the payment and the labor dispute in this case indicated that there was a meaningful connection between the two events. In support of their conclusion that the plaintiffs' emergency dues payments and the labor dispute that caused the plaintiffs' unemployment were temporally proximate, members Viventi and Cohl made the following findings:

1) The emergency dues were collected in October and November, 1967, at local UAW plants.

2) At the end of each month, the emergency dues were forwarded to the SIF of the UAW.

3) Those engaged in the labor dispute that caused the plaintiffs' unemployment received strike benefits from the UAW's SIF in January and February, 1968.

4) Therefore, the plaintiffs' emergency dues payments and the labor dispute which they assisted were separated by only about two months. The Supreme Court held that there was no rigid requirement that each plaintiff's emergency dues payment be traced directly to a GM foundry striker. Therefore, no extremely rigid time constraints should be placed upon consideration whether there is a temporal proximity between the plaintiffs' emergency dues payments and the labor dispute that caused the plaintiffs' unemployment. In this case, the two-month time lag does not destroy the temporal proximity of the plaintiffs' emergency dues payment and the receipt of strike benefits from the SIF manifests a meaningful connection.

The final part of the Viventi/Cohl meaningful connection definition held that a meaningful connection existed only where the emergency dues were for the purpose of supporting labor disputes which foreseeably included the labor dispute that caused the claimant's unemployment. If the emergency dues were for a purpose other than supporting labor disputes or, while for the general purpose of supporting labor disputes, were not for the purpose of supporting labor disputes like the ones which caused the plaintiffs' unemployment, then

there is no meaningful connection between the emergency dues payments and the labor dispute that caused the plaintiffs' unemployment. Members Viventi and Cohl looked to the statement of UAW officials who passed the emergency dues amendment and who explained the amendment to the UAW membership to determine the purpose for which the emergency dues were collected. In looking to these statements, members Viventi and Cohl relied upon *Applegate* v *Palladium Publishing Co*, 95 Mich App 299; 290 NW2d 128 (1980), *lv den* 409 Mich 904 (1980). Having determined that the purpose of the UAW leadership binds the plaintiffs (UAW members), board members Viventi and Cohl conclude that the emergency dues were intended to fund local labor disputes at GM plants, including the foundry plants which caused the plaintiffs' unemployment. Members Viventi and Cohl support their conclusion that the purpose behind the emergency dues was to fund local strikes at GM plants with the following findings:

1) Article 16 of the UAW constitution allowed the UAW leadership to call an emergency meeting and to describe and delineate the emergency.

2) Ninety-eight percent of the delegates to the convention voted for the constitutional amendments allowing emergency dues.

3) The "Proceedings" and the UAW letters to UAW members establish that the emergency dues were for purposes beyond the Ford and Caterpillar national strikes. There was no "earmarking" of the emergency dues for the Ford and Caterpillar national strikes. The purpose of the emergency dues included supporting local GM strikes.

4) Plaintiffs' emergency dues payments were voluntary since the UAW/GM contract ended September 6, 1967, and with it went the union security clause and the automatic check-off system.

Therefore, board members Viventi and Cohl determined that a meaningful connection existed between the plaintiffs' emergency dues payments and the labor disputes that caused the plaintiffs' unemployment. The meaningful connection existed because the amount of emergency dues paid was "substantial," the timing of the emergency dues payments and the labor dispute that caused the plaintiffs' unemployment was sufficiently proximate, and the purpose of the emergency dues payments included supporting local GM strikes. Consequently, since a meaningful connection existed between the payment of emergency dues and the labor dispute that caused the plaintiffs' unemployment, members Viventi and Cohl found that the plaintiffs were disqualified from receiving unemployment benefits by MES § 29(8)(a)(ii).

2. *Test Applied by Chairperson Hall*

Chairperson Hall proposed what she considered a "more practical and expedient" test for determining whether there is a meaningful connection between the plaintiffs' emergency dues payments and the labor dispute that caused the plaintiffs' unemployment.[9] She stated that this "practical and expedient" test would be based upon the intent of the Legislature to disqualify only persons whose conduct "would tend to prolong a labor dispute."[10] As such, Chairperson Hall proposed a meaningful connection definition with only one element. A meaningful connection exists between the claimant's emergency dues payment and the labor dispute that caused the claimant's unemployment only where the claimant paying the emergency dues and the person engaged in the labor dispute shared common interests and objectives concerning the labor dispute that caused the claimants' unemployment. If there were shared interests and objectives, the plaintiffs were disqualified from receiving unemployment benefits under MESA § 29(8)(a)(ii). However, absent common interests and objectives, the plaintiffs were not disqualified.

---

[9] Plaintiffs' Appendix, p 742a.

[10] Plaintiffs' Appendix, p 377a.

Chairperson Hall concluded that the plaintiffs and the shared common interests and objectives with the GM foundry strikers. She supports her conclusion with the following findings:

1) The plaintiffs and the foundry workers, through their unions, sent a 60-day notice that the national agreement would not be renewed.

2) The plaintiffs and the GM foundry strikers were all subject to the emergency dues.

3) The same event triggered the labor dispute in which the plaintiffs and the striking GM foundry workers were involved; *i.e.*, the non-renewal of the national UAW/GM agreement.

Therefore, Chairperson Hall concluded that a meaningful connection existed between the payments of emergency dues and the labor dispute that caused the plaintiffs' unemployment. The meaningful connection existed because the plaintiffs and those engaged in labor dispute that caused the plaintiffs' unemployment shared common interests and objetives.[11] Consequently, the plaintiffs were disqualified from receiving unemployment benefits by MESA § 29(8)(a)(ii).

3. *Test Applied by Member Gravelle*

Member Gravelle defined meaningful connection in a manner which he felt took into account "practical considerations and related issues implicated by [the] question" of a "meaningful connection," *Baker, supra*, p 668, and provided "a liberal construction * * * consonant with reason and good discretion." *Baker, supra*, p 664. Member Gravelle defined meaningful connection in terms of two facts. A meaningful connection exists, according to member Gravelle, where the claimant financed the labor dispute that caused his unemployment with contemporaneous emergency dues payments. Therefore, a meaningful connection existed only where the plaintiffs both made payments to support the labor dispute that caused their

[11] Plaintiffs' Appendix, p 379a.

unemployment and made those payments during the pendency of the labor dispute that caused their unemployment. As member Gravelle explained his meaningful connection definition,

> "If the contributions in issue either are not contemporaneous with the labor dispute causing the unemployment or do not subsidize the labor dispute causing the unemployment, no disqualification can result."[12]

Member Gravelle claims the basis of his meaningful connection definition is the language of MESA § 29(8)(a)(ii) which uses the present tense "is" to explain the timing of the financing which will result in disqualification. Therefore, according to member Gravelle, MESA § 29(8)(a)(ii) does not allow disqualification for past financing.

Member Gravelle applies his meaningful connection definition to the facts of this case and concludes that the plaintiffs' emergency dues payment are not meaningfully connected to the labor dispute that caused their unemployment. Member Gravelle's conclusion is based upon the following findings:

1) The labor dispute which caused the plaintiffs' unemployment was either the local negotiations which preceded the three local strikes at GM foundry plants or the three local GM foundry strikes in January and February, 1968.

2) If the plaintiffs' unemployment was caused by the negotiations leading up to the local strikes, there is no meaningful conenction between the plaintiffs' emergency dues payment and their unemployment since these negotiations were funded entirely by regular dues. Therefore, there is no connection *in fact* between the plaintiffs' emergency dues payments and their unemployment.

3) If the plaintiffs' unemployment was caused by the local GM foundry strikes, there is no meaningful connection between the plaintiffs' emergency dues payment and their unemployment since, while the strikes were supported by SIF dollars including emergency dues, the plaintiffs' emergency dues payments were

[12] Plaintiffs' Appendix, p 384a.

not contemporaneous with the strike that caused their unemployment. The emergency dues were paid in October and November, 1968, while the strike occurred in January and February, 1968.

Therefore, member Gravelle concluded that there was no meaningful connection between the plaintiffs' emergency dues payments and the labor dispute that caused their unemployment. Consequently, the plaintiffs were not disqualified from receiving unemployment benefits by MESA § 29(8)(a)(ii).

4. *Test Applied by Member Salomone*

Member Salomone joined member Gravelle's opinion and conclusion, but he added several parts to the meaningful connection definition proposed by member Gravelle. According to member Salomone, a meaningful connection exists between the claimant's emergency dues payment and the labor dispute that caused his unemployment only where the claimant voluntarily made direct, substantial payments during the pendency of the labor dispute that caused his unemployment and such payments were for the purpose of supporting, and actually did support, the labor dispute that caused the claimant's unemployment.

As applied to the facts of this case, member Salomone concluded that there was no meaningful connection between the plaintiffs' emergency dues payments and the labor dispute which caused their unemployment for the reasons stated in member Gravelle's opinion. In addition, member Salomone made the following findings:

1) The purpose of the emergency dues, whether one considers the union leadership's intent or the plaintiffs' individual intent, was only to support national strikes. There was no evidence on the record, according to member Salomone, that the purpose of the emergency dues was to support the local GM foundry strikes that caused the plaintiffs' unemployment.

2) The emergency dues payments were not voluntary. The plaintiffs were required to make the payments or risk losing their jobs for not being UAW members in good standing.

3) The amounts paid by each plaintiff were *de minimis* and insignificant. At most, each plaintiff paid $40 in emergency dues which may or may not have been actually used by the SIF to support the striking GM foundry workers.

4) In reality, union members' strike fund dues are an "insurance" fee and they intend that it inure only to their benefit.

Therefore, member Salomone concluded that there was no meaningful connection between the plaintiffs emergency dues payments and the labor dispute that caused their unemployment .There was no meaningful connection because the plaintiffs' emergency dues payments were not voluntary, were in *de minimis* amounts, were not for the purpose of supporting local GM foundry strikes, were not contemporaneous with the labor dispute that caused their unemployment, and were not in fact used to support the local labor dispute that caused the plaintiffs' unemployment (if the labor dispute was the negotiations leading up to the strikes). Consequently, member Salomone concluded that the plaintiffs were not disqualified from receiving unemployment benefits by MESA § 29(8)(a)(ii).

5. *Conclusion*

On their faces, the meaningful connection definitions proposed by the Board of Review members appear quite different. However, upon closer examination, it becomes evident that a majority of the board members considered three elements in determining whether plaintiffs' emergency dues payments were meaningfully connected to the labor dispute that caused their unemployment. The three elements included in most of the proposed meaningful connection definitions were amount, purpose, and timing.[13] In addition to these three elements, one

[13]Viventi & Cohl	Hall	Gravelle	Salomone	#
Amount			Amount	3
Purpose		Purpose	Purpose	4
Timing		Timing	Timing	4
	Commonality			1
			Voluntariness	1

member included "commonality" in her proposed meaningful connection definition and another member included "voluntariness" in his proposed meaningful connection definition.

We shall consider separately each element suggested for the meainingful connection definition.

C

In evaluating the suggested meaningful connection definitions and their constituent elements, we must remain mindful of the reasons that the Court in *Baker, supra,* required that the "financing" be meaningfully connected to the labor dispute that caused the plaintiffs' unemployment. MESA § 29(8)(a)(ii) is only one small part of a larger statute. In interpreting it in light of the whole statute, MESA § 29(8)(a)(ii) disqualifies persons who are "voluntarily" unemployed by financing the labor dispute that causes their unemployment. It does so because "financing" is one of the statutorily designated ways in which a person may evidence "direct involvement" in a labor dispute. MCA 421.29(8)(a); MSA 17.531(8)(a). Since "direct involvement" is prohibited activity, financing must be interpreted so that it helps the Court determine if the claimant was directly involved in the labor dispute that caused his unemployment. Consequently, "meaningfully connected" will be defined to include only those elements which manifest some direct involvement in the labor dispute that caused the claimant's unemployment. If a suggested element of a meaningful connection definition does not tend to show direct involvement compatible with the larger statute, it is not a proper element of the meaningful connection definition. The end result of a proper meaningful connection definition should be to delineate persons whose own activities have contributed to their unemployment so as to make them voluntarily unemployed and, therefore, ineligible for unemployment compensation benefits.

With this background, we turn our attention to determining the proper elements of the meaningful connection definition.

1

Three elements suggested by the plaintiffs and by Board of Review members are not part of the meaningful connection definition since they do not tend to show the kind of direct involvement envisioned by MESA § 29(8)(a)(ii). These unacceptable elements of the meaningful connection definition are direct payments from claimants to persons engaged in a labor dispute, commonality, and voluntariness. We exclude these elements for the following reasons.

The plaintiffs would have us define meaningful connection so as to require that there be a direct transfer of funds from the claimant to the person engaged in a labor dispute. They correctly argue that such a requirement would show a meaningful connection and direct involvement justifying the claimant's disqualification from unemployment benefits. They are also correct in saying that, were the Court to adopt this element into the meaningful connection definition, the plaintiffs would not be disqualified since they paid the emergency dues to the UAW and the UAW's SIF rather than directly to the striking GM foundry workers. However, the plaintiffs are wrong in asserting that such a direct connection is required in every case in order for a meaningful connection to exist. For the following reasons, a meaningful connection can exist in this case without a direct transfer of funds from the plaintiffs to the strikers. First, to define meaningful connection as existing only where there is a direct transfer of funds from the claimant to the person engaged in a labor dispute would unnaturally limit and restrict the financing disqualification to situations not involving organizations (such as unions) which act on behalf of members to accomplish the group's goals. Such a definition would provide an enormous exception to the financing disqualification which would effectively eliminate the legislative disqualification for financing. Second, a definition of meaningful connection which required a direct transfer of funds from the claimant to the person engaged in a labor

dispute would conflict with the statutory language of MESA § 29(8)(a)(ii) which inherently recognizes that financing involving organizations is not exempt from the financing disqualification. This is evident from the statute's language which explicitly states that union dues which are "regular" and " 'in amounts and for purposes established prior to the inception of [the] labor dispute' " are not financing under the statute.[14] By eliminating certain payments made to labor disputers through unions, but not other payments which might be made to labor disputers through unions, the Legislature indicated that not all financing through organizations will prevent the claimant from being disqualified for "direct involvement" in a labor dispute through financing. Third, this Court said in *Baker, supra*, that a meaningful connection does not require that the money be traced directly from the claimant to the labor disputer. We recognized that an organization (such as a union) cannot be used to shield a claimant from the financing disqualification. Therefore, we hold that a payment from the claimant directly to the person engaged in a labor dispute is not part of the meaningful connection definition.

We also reject the plaintiffs' suggestion that there can be no meaningful connection unless the claimant and the person engaged in the labor dispute share common interests and objectives. While Chairperson Hall is correct in saying that this element would, if adopted into the meaningful connection definition, provide an "expedient" test for determining whether there is a meaningful connection between the claimant's financing and the labor dispute that caused the claimant's unemployment, she and the plaintiffs are incorrect in reading this requirement into the meaningful connection definition. Like directness (see above), "commonality" as an element of the meaningful connection definition is inconsistent with the statutory language of MESA § 29(8)(a)(ii). MESA § 29(8)(a)(ii)

[14] *Baker, supra*, p 668.

stated that a claimant is directly involved and therefore disqualified from receiving unemployment benefits if he is "participating in *or* financing *or* directly interested in the labor dispute which causes [the individual's) total or partial unemployment." MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii) (emphasis added). As is clear from the use of the disjunctive word "or," financing is a concept separate from "participating in" or "directly interested in." Financing does not, therefore, require a showing that the claimant was either participating in or directly intersted in the labor dispute that caused his unemployment. "Directly interested" is defined in MESA § 29(8)(b) to encompass everything that the plaintiffs would have include in the meaningful connection definition under the rubric of "commonality of interest and objective." MESA § 29(8)(b) states:

> " 'Directly interested', as used in this subsection, shall be construed and applied so as not to disqualify individuals unemployed as a result of a labor dispute the resolution of which may not reasonably be expected to affect their wages, hours, or other conditions of employment, and to disqualify individuals whose wages, hours, or conditions of employment may reasonably be expected to be affected by the resolution of the labor dispute. A "reasonable expectation" of an effect on an individual's wages, hours, or other conditions of employment shall be considered to exist, in the absence of substantial preponderating evidence to the contrary, in any of the following situations:
>
> "(i) If it is established that there is in the particular establishment or employing unit a practice or custom or contractual obligation to extend within a reasonable period to members of the individual's grade or class of workers in the establishment in which the individual is or was last employed changes in terms and conditions of employment which are substantially similar or related to some or all of the changes in terms and conditions of

employment which are made for the workers among whom there exists the labor dispute which has caused the individual's total or partial unemployment.

"(ii) If it is established that 1 of the issues in or purposes of the labor dispute is to obtain a change in the terms and conditions of employment for members of the individual's grade or class of workers in the establishment in which the individual is or was last employed."

"(iii) If the labor dispute exists at a time when the collective bargaining agreement, which covers the individual's grade or class of workers in the establishment in which the individual is or was last employed and the workers in another establishment of the same employing unit who are actively participating in the labor dispute, has expired, has been opened by mutual consent or may by its terms be modified, supplemented, or replaced." MCL 421.29(8)(b); MSA 17.531(8)(b).

Since the statute treats commonality/directly interested as a concept separate and distinct from financing, it is not appropriately considered as part of the meaningful connection definition. Even without this statutory guidance, we would find that commonality is not part of the meaningful connection definition because MESA § 29(8)(a)(ii) is intended to disqualify those who are "voluntarily" unemployed as a result of financing the labor dispute which causes their unemployment. Whether one is financing a labor dispute and the degree to which he is doing so have no direct correlation with whether he will benefit from the "success" of the labor dispute. Therefore, we reject the plaintiffs' suggestion that commonality is a necessary part of the meaningful connection definition.

Finally, we reject the plaintiffs' contention that "voluntariness" is a necessary element of any meaningful connection definition. The voluntariness of the claimant's funding is not relevant to the meaningfulness of the connection between

the claimant's financing and the labor dispute which causes his unemployment. For example, a meaningful connection can exist where the claimant is forced to contribute directly to the labor dispute which causes his unemployment. Equally, there may be no meaningful connection where a contribution is voluntarily given. As such, voluntariness is not appropriately considered as a part of the meaningful connection definition since it says nothing about the meaningfulness or the connection between the payment and the claimant's unemployment.

However, we do not mean to say that voluntariness is irrelevant to disqualification under MESA § 29(8). Voluntariness is, of course, critical to a MESA § 29(8) discussion since MESA § 29(8) is intended to disqualify only those whose own actions cause their unemployment so that the unemployment is properly considered "voluntary." But, while voluntariness is relevant to the determination that "financing" or "participating" occurred, it is not relevant to a determination that the financing was meaningfully connected to the labor dispute which caused the claimant's unemployment. For that reason, it is excluded from the meaningful connection definition, but not from the earlier financing definition.

Lest we be required to hear this case a third time upon the plaintiffs' claim that the Board of Review failed to consider the voluntariness of their contributions in finding that there was financing and that the financing was meaningfully connected to the labor dispute which caused the plaintiffs' unemployment, we will dispose of the plaintiffs' claim that their emergency dues payments were not voluntary. The plaintiffs argue that their emergency dues payments were not voluntary since they were required by the UAW in order for them to remain UAW members and required by GM/UAW contract since UAW membership was a criterion for employment. By making this argument, the plaintiffs are again trying to use an organization, the UAW, as a shield to protect themselves from disqualification for financing the labor dispute

which caused their unemployment. As noted above, the statute does not recognize such a ploy. UAW membership is required for employment by GM because the UAW bargains for such a provision in its contract with GM. In so doing, the UAW represents its members and they must ratify any contract agreed upon by the UAW and GM. Therfore, any "coercion" resulting from the terms of the contract does not make the plaintiffs' action in accord with the contract "involuntary." As the Court of Appeals said in *Applegate* v *Palladium Publishing Co,* 95 Mich App 299, 305; 290 NW2d 128 (1980), and we adopt here:

> "Action taken by employees under a contract negotiated for them by their authorized agent must be considered their voluntary acts. In effect, plaintiff agreed to [act] pursuant to the collective bargaining agreement."

Any other holding would make all actions taken by union members pursuant to a union contract involuntary and relieve the members of responsibility for their contract-based actions. We cannot agree with such a rule. The plaintiffs' emergency dues payments were not involuntary.

Therefore, payment of union dues pursuant to the union's constitution or rules, or pursuant to a collective bargaining agreement, are voluntary payments for purposes of determining whether a payment constitutes financing within the meaning of MCL 421.29(8)(a)(ii); MSA 17.531(8)(a)(ii). But voluntariness does not affect the determination of whether there is a "meaningful connection" between the financing and the labor dispute which proximately caused the claimant's unemployment.

2

Having eliminated those suggested elements which are not appropriate components of the meaningful connection definition, we are in a position to state affirmatively the meaningful connection definition. A meaningful connection exists where, for the purpose of supporting labor disputes foreseeably encompassing the labor dispute that caused the claimant's

unemployment, the claimant engages in financing labor disputes in significant amounts and at times proximately related to the labor dispute which caused the claimant's unemployment.

Therefore, a meaningful connection between the financing and the labor dispute that caused the claimant's unemployment exists if three elements are present. First, the purpose of the financing must be, at least in part, to support labor disputes which foreseeably include the labor dispute that caused the claimant's unemployment. Second, the amount of financing must be significant, not *de minimis,* both in terms of the amount collected and in terms of the role that those funds played in the financing of the labor dispute that caused the claimant's unemployment. Third, the financing must occur at a time which is proximate to the supported labor dispute that caused the claimant's unemployment. Only if all three elements are present is there a meaningful connection between the financing and the labor dispute that caused the claimant's unemployment.

We shall now discuss in greater detail each component of the meaningful connection definition.

a. *Purpose*

The first component of the meaningful connection definition is delineated by the phrase "for the purpose of supporting labor disputes foreseeably encompassing the labor dispute which caused the claimant's unemployment." There are five aspects of the "purpose" requirement which merit further discussion.

First, it is assumed that by the time the Court considers whether a meaningful connection exists, it has already determined that the labor dispute which caused the claimant's unemployment was *in fact* financed by payments from the claimant. If it was not, there can be no meaningful connection between the claimant's payments and the labor dispute which caused his unemployment. This is true regardless of whether the claimant made the payments with the specific intent and

for the specific purpose of assisting and supporting the labor dispute that caused his unemployment. Purpose, no matter how strong, will not substitute for actual financing.

Second, a meaningful connection between the financing and the labor dispute that caused the claimant's unemployment is demonstrated only if the labor dispute that caused the claimant's unemployment was foreseeably within the scope of labor disputes for which the claimant gave financing. If it was not, there can be no meaningful connection. In other words, if the claimant gave financing for the purpose of supporting labor disputes different in kind or scope from the one that actually caused his unemployment, there is no meaningful connection between the financing and the labor dispute that caused the claimant's unemployment.

Third, in addition to the labor dispute financed being foreseeably within the scope of the purpose of the financing, the claimant's resulting unemployment must also be foreseeable. If the purpose of the financing was to support labor disputes which could not foreseeably have caused the claimant's unemployment, the purpose aspect of a meaningful connection definition has not been shown. This is so since MESA § 29(8)(a)(ii) is only intended to disqualify those persons who are "voluntarily" unemployed. A person who could not reasonably foresee the fact that his financing would cause his unemployment cannot be said to be "voluntarily" unemployed. Therefore, the purpose of the financing must potentially expose the claimant to unemployment caused by the labor disputes he financed.

Fourth, the purpose of the financing must be determined from the point in time that the financing occurred. It should not be determined by using hindsight or by reference to statements after the financing occurred. The purpose is determined according to the facts as they appeared at the time of the financing.

Fifth, the purpose of the financing in cases involving union

dues may come either from the claimant's own statements or from the statements of union officials. It is not necessary that the individual union members consciously or affirmatively adopt the union's stated purposes. It is sufficient that the union collected the funds from the claimant for the purpose of supporting labor disputes which foreseeably included the labor disputes that caused the claimant's unemployment. The union member may not assist the union's purpose by contributing while seeking to shelter himself from disqualification from unemployment benefits by not ratifying the union's purpose. As the Court of Appeals said in *Applegate, supra,* p 304, and we adopt here:

> "by being a member of the union, the employees had ratified or joined in the decisions of the union and were bound by those decisions. 'Any other result would destroy the principles of collective bargaining and render union-management contracts meaningless.' " *Bergseth* v *Zinsmaster Baking Co,* 252 Minn 63, 70; 89 NW2d 17 (1958).

Therefore, the purpose of the financing may be found either in the claimant's own statements or in the statements of the organziation which collects the funds and to which he is a member.

b. *Amount*

A meaningful connection between the claimant's financing and the labor dispute that caused his unemployment must involve significant amounts of financing. *De minimis* amounts do not demonstrate a meaningful connection between the financing and the labor dispute that caused the claimant's unemployment. This is an important connection since, as the United States Supreme Court recognized in *New York Telephone Co* v *New York State Dep't of Labor,* 440 US 519, 526; 99 S Ct 1328; 59 L Ed 2d 553 (1979), it is a "fundamental truism" that the availability of strike benefits has a direct effect upon the willingness of persons to go on strike and, once on strike, to

remain on strike. Therefore, the amount of financing is an important consideration in determining whether there is a meaningful connection between the financing and the labor dispute that caused the claimant's unemployment.

In determining whether the amount of financing is significant or *de minimis*, the Court must consider four different figures. First, if the claimant is engaged in financing through an organization, the Court must review the amount of financing in terms of the entire program as well as in terms of the individual's contribution. Second, in cases of non-ordinary union dues, the Court must compare the claimant's regular contribution with his non-ordinary contribution to determine whether the amount of the "emergency" dues is significant or *de minimis*. Third, in cases involving non-ordinary union dues, the Court must consider the effect of the "emergency" dues upon the resources of the union allocated to supporting labor disputes. Finally, in cases involving regular and non-ordinary union dues, the Court must consider the role which the "emergency" dues played in supporting the labor dispute that caused the claimant's unemployment. Regarding the role that the "emergency" dues played in supporting the labor dispute which caused the claimant's unemployment, the plaintiffs contend that the Court must adopt one of two accounting methods: either they must say that the first funds in to the account are the first funds out of the account (FIFO) or they must say that the funds last into the account were the first funds out of the account (LIFO). However, we find it unnecessary to adopt either the FIFO or the LIFO method. Where the plaintiffs' emergency dues payments go into a fund which also contains the non-emergency dues, the resulting commingling of the funds is attributable to the plaintiffs. Once commingling occurs, both FIFO and LIFO are mythical in nature. Reality indicates that the funds are taken out of the account in proportion to their percentage in the funds. In other words, the percentage of the entire fund from each

source is reflected in the disbursements from the fund. As applied to the UAW's SIF, which is composed of payments from both regular and emergency sources, payments from the fund should be considered to be composed of the same percentage of regular dues and emergency dues as the larger fund. We believe that such an approach is both fair and logical where the regular and emergency dues are commingled in a single fund.

c. *Temporal Proximity*

A meaningful connection between the financing and the labor dispute that caused the claimant's unemployment requires that the payments be made at a time which is closely related to the labor dispute that caused the claimant's unemployment. The relationship between the timing of the financing and the timing of the labor dispute that caused the claimant's unemployment is important to any meaningful connection definition because the temporal connection may become so attenuated as to make the purpose of the payment or the amount of the payment meaningless.

However, requiring that the meaningful connection include temporal proximity does not require payments exactly contemporaneous with the supported labor dispute as the plaintiffs assert. Instead, temporal proximity requires that the two events, the financing and the labor dispute that causes the claimant's unemployment, be meaningfully connected in the sense that one event follow upon the other without a major break. The determination of whether there is temporal proximity or whether there is a break in the sequence that attenuated the connection depends upon the practical realities of the time needed to collect, transfer and disburse the non-ordinary funds. Since this is a factual determination which will depend upon the unique facts of each case, this Court will not establish bright line time limits within which there is temporal proximity and beyond which there is attenuation.

d. *Conclusion*

A meaningful connection exists between the financing and the labor dispute that causes the claimant's unemployment where, for the purpose of assisting labor disputes which reasonably and foreseeably include the labor dispute that caused the claimant's unemployment, the claimant finances in significant amount and in temporal proximity the labor dispute that cuases his unemployment. Where the Court finds these three elements present (purpose, amount, and timing), there is a meaningful connection between the financing and the labor dispute that causes the claimant's unemployment.

D

1

Before we can apply the test to the facts of this case, we must first decide what facts were found by the Board of Review. To do this, we must resolve the plaintiffs' challenges to the admittance of evidence at final arguments after the Board of Review reopened the record. The plaintiffs challenge the board's admittance of the evidence for three reasons: first, the Board of Review abused its power in reopening the record to admit additional evidence, over plaintiffs' objections, at final arguments. Second, even if the Board of Review did not abuse its power in reopening the record, it exercised the power in such a way as to violate the plaintiffs' due process right to a fair hearing and deprived them of the opportunity to respond to the evidence. Third, the evidence was inadmissible for substantive reasons.

a. *Reopening of Record to Admit UAW Documents and Newspaper Articles*

The plaintiffs contend that the opinion below is based upon incompetent evidence since the Board of Review abused its power by reopening the record at final arguments to admit UAW special convention "Proceedings," newspaper articles and "Solidarity" newspaper articles. Admittedly, all five Board of Review members accepted and considered the additional

evidence (in greater and lesser degrees) in reaching their conclusions.

However, the fact that the board reopened the record to admit the evidence does not make its admission erroneous and does not automatically bar its use. The presiding officer at an administrative hearing has the power to "[r]egulate the course of the hearings, set the time and place for continued hearings and fix the time for filing of briefs and other documents." MCL 24.280(d); MSA 3.560(180)(d). The law does not limit the chairperson's power to regulate the course of the hearings only prior to the closing of the record. Absent any stated legislative limit on the chairperson's power to regulate the course of the hearings following the closing of the record, we shall not create one. The Legislature committed this power to the discretion of the chairperson. Barring an abuse of discretion, the chairperson may reopen the record at final arguments to admit additional evidence. The plaintiffs have not presented evidence that an abuse of discretion occurred in this case. Therefore, Chairperson Hall had the power to reopen the record and did not abuse her discretion in so doing.

b. *Admission of Evidence Into Reopened Record As Violation of Right to Fair Hearing*

The plaintiffs contend that the Board of Review's admission of evidence into a reopened record violates their right to a fair hearing. Specifically, they allege that the Board of Review denied them the right to cross-examine and rebut the evidence admitted into the reopened record.

A party before the Board of Review has a right to cross-examine opposing witnesses and rebut the evidence against him. 1979 AC, R 421.1207(4)(c),(e). These rights are not reduced when the board reopens a record to admit additional evidence. However, both rights must be asserted to constitute a valid basis for objection on appeal. The record of the December 8, 1981, final arguments does not indicate that plaintiffs or their counsel asserted the right to cross-examine or rebut the evi-

dence. Rather, they merely objected to the substantive admissibility of the evidence. After the board admitted the evidence, the hearing ended without further objection from the plaintiffs. The right to cross-examine witnesses and rebut evidence may be waived. In this case, it was waived by the plaintiffs' failure to assert it.

The plaintiffs having waived their right to cross-examine or rebut the evidence, the Court will not now find a due process violation (a denial of fair hearing), barring the existence of a miscarriage of justice. No miscarriage of justice is presented in this case.

We find the plaintiffs' other assertion of due process violations to be without merit.

c. *Admissibility of the Evidence*

UAW "Proceedings"

The plaintiffs raise five objections to the admission of the "Proceedings." First, the plaintiffs assert that the "Proceedings" are not the best evidence of what transpired at the special convention; the participants could provide the best evidence. Such an argument is based upon a misunderstanding of the best evidence rule; there is no hierarchy of evidence in Michigan and the best evidence rule only requires that the "original" document be produced. ***Michigan Bankers Ass'n*** v ***Ocean Accident & Guarantee Corp, Ltd,*** 274 Mich 470; 264 NW 868 (1936); MRE 1002.

Second, the plaintiffs assert that the "Proceedings" were not authenticated. However, the "Proceedings" were authenticated by the board's questioning of plaintiffs' attorney.[15]

Third, the plaintiffs object to the admission of the "Proceedings" on the ground that the defendant was not required to state the relevancy of the material. However, GM did state the relevance of the "Proceedings": the evidence was offered to show the "intent motive" behind the special dues.[16] While the Board of Review never explicitly required GM to clarify their "intent motive" statement before admitting the evidence, the record sufficiently indicates that GM stated the relevancy of the "Proceedings" as showing the UAW's reason for requiring the emergency dues. Therefore, the board's admission of the "Proceedings" on this point is not error requiring reversal.

[15]In response to inquiries, the plaintiffs' attorney admitted that "Proceedings" was probably transcribed from reporters' notes made at the time of the special convention, that "Proceedings" was published by the UAW, that "Proceedings" was the "official" version of what transpired at the convention, and that the UAW made the record with the intention that it be reliable and relied upon by its official and any union members who read the "Proceedings." Plaintiffs' Appendix, pp 171a-172a.

Plaintiffs' fourth claim is that the "Proceedings" are not relevant to their personal knowledge or purpose in paying the emergency dues at issue in this case since the "Proceedings" only shows the UAW's intent or purpose. While the plaintiffs are correct in saying that the "Proceedings" does not contain their individual purpose statements, they are not correct in assuming that the UAW's intent is irrelevant to ascertaining whether there is a "meaningful connection" between the emergency dues and the strike which caused the plaintiff's unemployment. See above.

Fifth, the plaintiffs contend that "Proceedings" are inadmissible hearsay. Michigan Rule of Evidence 801(d)(2) provides that admissions by a party-opponent are *not* hearsay. An admission is defined to include a statement by a party's "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship," and offered against the party. MRE 801 (d)(2)(D). A labor union is clearly the agent of its members concerning the purpose of proposed union dues and union collective bargaining strategy. Even if the "Proceedings" qualify as hearsay, Chairperson Hall developed, by her questioning of the plaintiffs' attorney, that the "Proceedings" fall within the business records exception to the hearsay rule. MRE 803(6). The "Proceedings" was the "official" record of what transpired at the special con-

[16]Plaintiffs' Appendix, p 170a; Tr. 12/8/81, p 10.

vention, it was compiled by the union according to a general practice, it was made soon after the special convention by persons with personal knowledge of what transpired at the special convention, and it was available to the union members as an accurate record of what transpired at the special convention. Under MRE 803(6), the "Proceedings" qualify as a business records exception to the hearsay rule.

"Solidarity" Newspaper Articles

As with the "Proceedings," plaintiffs raise numerous objections to the Board of Review's admission of 22 newspaper clippings. Since the newspaper articles are sufficiently similar to be treated as one kind of evidence, and since the plaintiffs' objections are generalized, we shall not treat plaintiffs' objections to each newspaper clipping individually.

The plaintiffs' primary objection to the Board of Review's admittance of these newspaper articles is that they are and contain inadmissible hearsay. Specifically, the plaintiffs assert that the newspaper articles contain unsworn, out-of-court statements of reporters and their named and unnamed sources and that these statements were offered for the truth of the matter asserted. We agree with the plaintiffs that these newspaper articles are hearsay and that they do not fall within any recognized exception. However, while they should not have been admitted, the error is not so grievous that relief is required to correct the error. The information contained in the newspaper accounts merely confirms information contained in properly admitted evidence. Therefore, while erroneously admitted and not a proper independent basis for the Board of Review's decision, the evidence is merely supportive of other admissible evidence. It is noteworthy that the newspaper articles are cited almost exclusively in footnotes supporting findings based upon the "Proceedings" or a UAW letter. We shall ignore them in this decision.

2

Having dealt with plaintiffs' evidentiary objections, we now

apply the "meaningfully connected" definition to the facts of this case to determine whether the purpose of, amount of, and timing of the plaintiffs' emergency dues payments indicates a meaningful connection to the local GM foundry strikes which caused the plaintiffs' unemployment.

a. *Purpose*

Under the meaningful connection definition, the purpose of the emergency dues payments must be to support labor disputes which foreseeably included the ones that caused the plaintiffs' unemployment. In this case, there can be no doubt that the emergency dues were assessed and paid for the purpose of supporting labor disputes. There is overwhelming support for this conclusion. First, the "Proceedings" stated the purpose of the special convention at which Article 16 of the UAW constituion was amended to require the payment of emergency dues payments to be as follows:

> "1. Review the status of our 1967 collective bargaining effort.
>
> "2. To consider revision of the dues program of the International Union, UAW, to provide adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort.
>
> "3. To consider revisions of the Constitution of the International Union as it relates to the payment of dues, strike funds, membership eligibility, strike insurance program and other matters related to emergencies facing the International Union, UAW."[17]

Second, the emergency dues payments were forwarded to the UAW International Union Strike Insurance Fund. As the name of the fund implies, the fund into which the emergency dues were paid was for the stated purpose of supporting labor disputes, specifically strikes. Third, as UAW executive Woodcock stated in his letter to GM UAW workers:

[17]Plaintiffs' Appendix, p 487a.

> "These emergency extra dues are being raised to protect GM workers as well as support the Ford strikers. When our time comes at GM, we cannot go back to the bargaining table without an adequate strike fund behind us and promise of continued assistance from other UAW members."[18]

Therefore, it is clear that the emergency dues were established and paid for the purpose of supporting labor disputes.

However, as noted above, it is not sufficient that the emergency dues are for the purpose of supporting labor disputes. The payments must be for the purpose of supporting labor disputes, foreseeably including those that caused the plaintiffs' unemployment. On this point, the plaintiffs contend that their emergency strike fund dues were intended only for the support of the national strikes against Ford and Caterpillar. Alternatively, they argue that even if the emergency dues were intended to support labor disputes beyond the Ford and Caterpillar strikes, the purpose of the emergency dues was limited to supporting national strikes and excluded supporting local strikes similar to the ones that caused the plaintiffs' unemployment. However, the record does not support the plaintiffs' contentions.

It is clear that the impetus for the October 8, 1967, special convention was the stalemated bargaining and national strikes against Ford and Caterpillar. However, the purpose of the emergency strike dues approved at the October 8, 1967, conference was not limited to the national strikes at Ford and Caterpillar. The background statement of the "Proceedings" mentions other possible strikes beyond the national strikes at Ford and Caterpillar.

> "To support the Ford and Caterpillar workers in their strike and to assure strike benefits to members who may be involved in other strikes in the course of the critical weeks and months ahead, a temporary emergency dues increase is needed, the total increase going into the International Strike Fund to be used exclusively to support workers and their families when they are forced to strike to achieve their just demands."

[18] 1967 Ex. 90.

Later in the "Proceedings," UAW official Mazey said:

> "In the event we have a strike at General Motors — and my educated guess is that unless General Motors Corporation begins to bargain intelligently and unless the GM Corporation begins to improve the grievance procedure and representation system in the GM contract, we are going to have a strike in that corporation — I am sure that nobody would want Vice President Leonard Woodcock and the bargaining committee to go to the bargaining table at General Motors with our strike fund depleted."

Additionally, it is clear that the purpose of the emergency dues was not limited to supporting the Ford and Caterpillar national strikes since those strikes ended before the first emergency dues were forwarded to the UAW's SIF.[19] Finally, the emergency dues amendment to UAW Constitution, Article 16, does not place any limitation upon the future use of the funds raised by the emergency dues. Therefore, the evidence shows that the purpose of the emergency dues was not merely to support the national strikes against Ford and Caterpillar.

The record also does not support the plaintiffs' contention that the purpose of the emergency dues excluded assisting persons engaged in local labor disputes with GM. Rather, it is clear that local GM UAW members were potential beneficiaries of the emergency strike dues. As Leonard Woodcock, then UAW Vice President and Director of the General Motors Department, said in an October 13, 1967, letter issued to explain the increased strike dues and addressed "To All UAW Members in General Motors Plants and Warehouse, USA":

[19] The national Ford strike was settled October 22, 1967, and the national Caterpillar strike was settled October 25, 1967.

> "Every penny of this increase will go into the strike fund to help pay strike assistance benefits to Ford and Caterpillar Tractor strikers and other UAW members currently on strike. It is also needed to replenish the fund so that our bargaining teams at General Motors and Chrysler — and other plants — can bargain with the assurance that strike assistance benefits will be available should those workers have to hit the bricks later on.
>
> * * *
>
> "These emergency extra dues are being raised to protect GM workers as well as support the Ford strikers. When our times comes at GM, we cannot go back to the bargaining table without an adequate strike fund behind us and promise of continued assistance from other UAW members."[20]

The letter goes on to make it clear that the emergency dues will be available to support local strikes when it justifies the emergency dues by citing 1964 GM local strikes:

> "In 1964, you will recall, we had a 10-day strike at GM on national issues, followed by many local strikes, some lasting as long as six weeks. This resulted in a strike fund expenditure of $37,383,698.08."[21]

Additionally, the record adequately demonstrates the crucial role of local strikes in contract negotiation. Local strikes, funded by the UAW's SIF, occurred following a national contract agreement with GM in *every* contract year starting in 1958.[22] These local strikes, most notably those in 1964, were very costly to the UAW's SIF.[23] Therefore, at the time that the emergency dues were paid, both national and local strikes appeared possible and even probable. Consequently, the evidence shows that supporting local GM strikes was within the

[20]1967 Ex. 90.
[21]1967 Ex. 90.
[22]Tr. 6/22/81, pp 18, 24.
[23]Tr. 6/22/81, pp 19, 28.

purpose of the emergency dues payments and that it was foreseeable that the emergency dues would *in fact* be used to support local GM strikes.

The final aspect of the purpose analysis focuses on whether it was foreseeable at the time of the financing that supporting the labor disputes would cause the claimant's unemployment. In this case, there is and can be no dispute on this issue. Since it was foreseeable that local GM strikes would occur and be financed by the emergency dues, and since automotive industry production is based upon a series of interrelated production units which produce only one component of the automobile, it is obvious that a local labor dispute which idles one plant might cause layoffs at other plants which rely upon the component produced at the idled plant. This "chain reaction" can move both "up" and "down" the line. Therefore, layoffs at plants not presently engaged in a local labor dispute were foreseeable due to local disputes.

In conclusion, the evidence adduced in this case supports the conclusion that the purpose of the emergency dues included supporting labor disputes including those that actually caused the plaintiffs' unemployment. Therefore, the first portion of the meaningful connection definition is met.

b. *Amount*

The second element of the meaningful connection definition considers whether the amount of financing is significant so as to demonstrate a meaningful connection to the labor dispute that caused the claimant's unemployment. As applied to this case, we must, under this portion of the meaningful connection definition, consider three aspects of the amount contributed through emergency dues. Each aspect considered points to the conclusion that the amount of financing involved in the emergency dues payment was significant and is meaningfully connected to the labor dispute that caused the plaintiffs' unemployment.

First, when we consider the amount of financing involved with the entire emergency dues program, we cannot help but be impressed with the significant role that the emergency dues played in the UAW's ability to financially support labor disputes. The significance in turn is due to the amount of financing involved in the emergency dues program. This is manifested by the following numbers which demonstrate both the amount and importance of the emergency dues for the UAW's SIF. On October 31, 1967, the UAW's SIF contained $41,685,651.[24] This amount was essentially due to regular dues contributions plus interest earned on that money. In November, 1967, the UAW's SIF received new payments totaling $14,195,411.[25] Of this amount, only $2,070,504 came from regular union dues while $12,124,907 came from the emergency dues.[26] The disbursements from the SIF for November, 1967, totalled, $12,544,860.[27] Therefore, the ratio of each dollar disbursed in November, 1967, came from the SIF was 78 cents from the payment of regular dues and 22 cents from the payment of emergency dues.[28] In December, 1967, the SIF took in $13,441,418 of which $2,070,504 was from regular union dues and $11,207,914 was from the payment of emergency dues.[29] Of the $3,686,807 disbursed from the SIF in December, 1967, the ratio of each dollar disbursed was 63 cents from regular dues and 37 cents from emergency dues.[30] At the beginning of 1968, the SIF had grown to $53,090,814 and added $14,893,039 in January receipts.[31] Of the new funds, $12,772,535 came from emergency dues payments.[32] Of the $2,809,765 disbursed in January, 1968, the ratio of each dollar was 53 cents from regular dues and 47 cents from emergency dues.[33] In February, 1968, the SIF had income of $6,180,213 of which $4,109,709 was attributable to the emergency dues.[34] Therefore, the ratio of each dollar disbursed in February ($5,044,792) was 51 cents from the regular dues and 49 cents from emergency dues.[35] Therefore, the amount of the payments was significant and consequently manifests a meaningful connection to the labor dispute that caused the plaintiffs' unemployment.

[24]Plaintiffs' Appendix, p 263a.
[25]Plaintiffs' Appendix, p 264a.
[26]The regular dues figure represents the average monthly income from regular dues during the first ten months of 1967.
[27]Plaintiffs' Appendix, p 264a.
[28]Total in fund during month: 55,881,062 = 41,685,651 + 14,195,411. Regular dues in fund: 43,756,155 = 41,685,651 + 2,070,504. Emergency dues in fund: 12,124,907. 43,756,155 divided by 55,881,062 = .78, 12,124,907 divided by 55,881,062 = .22.
[29]Plaintiffs' Appendix, p 264a.
[30]Plaintiffs' Appendix, pp 358a-359a. Computation as per fn 28.
[31]Plaintiffs' Appendix, p 265a.

Second, when we consider the amount of financing in terms of the plaintiffs' payments, we again find that the amounts were significant and demonstrate a meaningful connection to the labor dispute that caused the plaintiffs' unemployment. Prior to the commencement of emergency dues, each plaintiff (like all UAW members) paid $1.25 per month to the UAW's SIF. After the commencement of emergency dues, each plaintiff paid either $11.25 or $21.25 per month to the UAW's SIF.[36] The emergency dues therefore increased the plaintiffs' support of the UAW SIF by either 800% or 1600%. By any standard, the amount of increase is significant and demonstrates a meaningful connection with the labor dispute that caused their unemployment. Even beyond the amount of increase, the dollar amount contributed by the plaintiffs is also significant and demonstrates a meaningful connection with the labor dispute which caused their unemployment. Each plaintiff paid either $10 or $20 per month for emergency dues. These payments were continued for two months. Therefore, during the two months that the emergency dues were in effect, the 19,000 plaintiffs contributed between $280,000 and $760,000

[32]Plaintiffs' Appendix, p 265a. See fn 26.
[33]Plaintiffs' Appendix, pp 358a-359a. Computation as per fn 28.
[34]Plaintiffs' Appendix, p 266a. See fn 26.
[35]Plaintiffs' Appendix, pp 358a-359a. Computation as per fn 28.
[36]UAW S Ct Appendix, p 37a and UAW "Proceedings," Plaintiffs' Appendix, p 500a. See fn 6.

in emergency dues to the UAW's SIF. These amounts are significant, not *de minimis,* and represent a meaningful connection with the labor dispute that caused the plaintiffs' unemployment.

Third, when we consider the amount of financing in terms of the role emergency dues played in the strike benefit payments to persons involved in the labor dispute that caused the plaintiffs' unemployment, we again find that the amounts are significant and demonstrate a meaningful connection with the labor dispute which caused the plaintiffs' unemployment. At the time that striking GM foundry workers received SIF benefits in January, 1968, the SIF was composed of 53% regular dues and 47% emergency dues.[37] By February, 1968, the SIF was composed of 51% regular dues and 49% emergency dues.[38] Consequently, the source of the benefits paid to the striking GM foundry workers was nearly evenly divided between regular dues and emergency dues. Therefore, the amount of the strike payments to the strikers involved in the labor dispute that caused the plaintiffs' unemployment from emergency dues is significant and demonstrates a meaningful connection with the labor dispute that caused the plaintiffs' unemployment.

All three aspects of the amount portion of the meaningful connection definition point toward a meaningful connection between the plaintiffs' payment of emergency dues and the labor dispute that caused their unemployment.

c. *Timing*

The final element of the meaningful connection definition considers whether the financing is temporally proximate to the labor dispute that caused the claimant's unemployment. As applied to this case, we find that this portion of the meaningful connection definition is satisfied since the payment of emergency dues immediately precedes the support of the labor dispute that caused the plaintiffs' unemployment.

[37]See fn 33.
[38]See fn 35.

The UAW amended its constitution to provide for the collection of the emergency strike fund dues on October 8, 1967. The dues were collected from the UAW members in October and November, 1967. The SIF received emergency strike fund payments in November and December, 1967. The SIF disbursed strike fund benefits to the striking GM employees in January and February, 1968. The time lag between the collection and disbursement of the strike fund benefits is minimal when it is considered that the funds were collected "by hand" at the local level, were forwarded to the SIF, and were distributed to striking GM employees only after they had satisfied an initial waiting period requirement. Therefore, the temporal proximity of the plaintiffs' emergency dues payments and the use of those emergency dues to support the labor dispute that caused their unemployment demonstrates that a meaningful connection exists.

d. *Conclusion*

The three components of the meaningful connection definition are all satisfied in this case. The purpose of, amount of, and timing of the plaintiffs' emergency dues payments all indicate that there is a meaningful connection between their payments and the labor dispute that caused their unemployment. Therefore, the Board of Review properly concluded that the plaintiffs were disqualified from receiving unemployment benefits by MESA § 29(8)(a)(ii). The plaintiffs are not eligible for unemployment benefits because they caused their unemployment by financing, in a meaningfully connected way, the labor dispute that caused their plaintiffs' unemployment.

III

The plaintiffs claim that the MESA § 29(8)(a)(ii) financing disqualification violates the federal constitution's Supremacy Clause (US Const, art VI, cl 2) since the financing disqualification inhibits the exercise of rights guaranteed in § 7 and § 8 of the National Labor Relations Act. Specifically, the plaintiffs

contend that the NLRA, a federal statute, guarantees the plaintiffs, as employees, the right to "assist labor organizations" and to "engage in other concerted activities for the purpose of collective bargaining." NLRA § 7, 29 USC 157. However, according to the plaintiffs, MESA § 29(8)(a)(ii) penalizes the plaintiffs for exercising these federally guaranteed rights by making financial assistance to one's labor union a basis of disqualification from entitlement to unemployment benefits. Therefore, under the Supremacy Clause, the plaintiffs contend, the federal statute (NLRA) pre-empts the state statute (MESA § 29[8] [a] [II]) which conflicts with the congressional intent to guarantee certain rights to employees as expressed in § 7 and § 8 of the NLRA.

A

The Supremacy Clause of the federal constitution states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitutio or Laws of any State to the Contrary notwithstanding." US Const, art VI, cl 2.

The pre-emption doctrine of the Supremacy Clause is well established and may be easily stated. The Supremacy Clause pre-empts state laws which conflict with federal laws except where congressional intent to tolerate the conflicting state law exists. The general test adopted by the United States Supreme Court to determine when the Supremacy Clause has been violated may also be easily stated. The two-part test involves, first, determining whether there is *in fact* a conflict between the federal law and the state law and, second, determining whether Congress intended to tolerate such a conflict between the federal law and the challenged state law.

However, easy articulation of the pre-emption rule and test

does not translate always into easy application of the state rule and test to a given fact situation. In reality, the task of determining whether the Supremacy Clause has been violated is often difficult.

The difficulty involved in applying the pre-emption doctrine to the facts of a given case is particularly apparent when state laws "conflict" with federal labor relations laws. As the United States Supreme Court said in *Garner* v *Teamsters Union,* 346 US 485, 488; 74 S Ct 161; 98 L Ed 228 (1953), regarding federal labor relations law pre-emption:

> "The national * * * Act * * * leaves much to the states, though Congress has refrained from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is still permissible."[39]

More recently, the United States Supreme Court again spoke of the subtle and sometimes arduous task of determining whether the federal labor relations law pre-empts a challenged state law:

> "The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.'" *New York Telephone Co* v *New York State Dep't of Labor,* 440 US 519, 527; 99 S Ct 1328; 59 L Ed 2d 553 (1979), citing *Sears, Roebuck & Co* v *San Diego County Dist Council of Carpenters,* 436 US 180, 187; 96 S Ct 1745; 56 L Ed 2d 209 (1978).

B

Each party, however, seeks to rescue this Court from the necessity of treading a path of implicit limits and unstated

[39]The *Garner* language speaks of the Labor Management Relations Act and not of the NLRA. However, the United States Supreme Court has cited the *Garner* language as edited and quoted here in NLRA cases. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers* v *Wisconsin Employment Relations Comm,* 427 US 132, 136; 96 S Ct 2548; 49 L Ed 2d 396 (1976).

boundaries by directing our attention to one United States Supreme Court case which provides *the* answer to whether the financing disqualification contained in MESA § 29(8)(a)(ii) conflicts with § 7 and § 8 of the NLRA in violation of the Supremacy Clause. The plaintiffs, for their part, cite *Nash* v *Florida Industrial Comm*, 389 US 235; 88 S Ct 362; 19 L Ed 2d 438 (1967). The defendant, on the other hand, cites *New York Telephone Co* v *New York State Dep't of Labor, supra.* Upon close examination, however, we are convinced that neither case controls the issue raised in this case.

In *Nash,* the claimant was disqualified from receiving unemployment compensation benefits because the Florida Industrial Commission found that she was engaged in a labor dispute with her employer. According to the commission, a labor dispute existed because a state law said that the filing of a charge with the National Labor Relations Board by an employee against her employer constituted a labor dispute. Further, the state law disqualified from unemployment benefits all persons whose "total or partial unemployment is due to a labor dispute in active progress which exists at the * * * premises at which he is or was last employed."[40] The claimant appealed this decision to the United States Supreme Court where she argued that the commission's ruling violated the Supremacy Clause of the federal constitution because the ruling "frustrated" enforcement of the NLRA.

The United States Supreme Court agreed with the claimant and held that the state statute conflicted with the NLRA and that the federal law pre-empted the state law since enforcement of the state law would "thwart" the congressional intent and would "impede" resort to the federal act.[41] In reaching this result, the United States Supreme Court used a two-step analysis. First, it identified the conflict between the federal right asserted by the claimant and the state law relied upon by

[40] Florida Unemployment Compensation Law, § 443.06, renumbered § 443.101.
[41] *Nash, supra*, p 239.

the commission. The federal right was found in § 8(a)(4) of the NLRA which makes it an unfair labor practice for employers to discriminate against employees who filed unfair labor practice charges.[42] The state law, on the other hand, made the exercise of that federal right the basis for disqualification from unemployment compensation benefits. Therefore, the state law had a direct tendency to frustrate the federal right. Second, having identified a conflict in fact between federal law and the challenged state law, the United States Supreme Court stated that there was no congressional intent to tolerate such a conflict. The intent of Congress was to "leave people free to make charges of unfair labor practices to the Board." The state law had a "direct tendency to frustrate the purposes of Congress." *Nash, supra*, p 239. Therefore, the federal law pre-empted and invalidated the state law.

Relying upon *Nash,* the plaintiffs assert that *Nash* is controlling in this case. To support their assertion they apply the United States Supreme Court's *Nash* analysis to the facts of this case. First, they identify the federal rights allegedly involved in this case: NLRA §§ 7 and 8; 29 USC 157, 158. NLRA § 7 provides, in pertinent part, as follows:

> "Employees shall have the right to * * * join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *."

NLRA § 8 makes the violations of the NLRA § 7 right an unfair labor practice. The MESA, according to the plaintiffs, disqualifies them from receiving unemployment benefits merely because they have asserted their federal right to "assist" their union by paying union dues. Having identified the conflict, the plaintiffs cite *Nash*, p 239:

[42] The NLRA "employer" provisions are equally applicable to the state. As the United States Supreme Court stated in *Nash*, p 239:

> "We have no doubt that coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the States."

> "[A state] should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the Government's constitutional plan * * *."

The plaintiffs continue their argument by stating that:

> "*Nash* governs this case, precisely because, through application of § 29(8)(a)(ii) of MESA, the state has impaired claimants' rights which, under NLRA, are expressly protected against * * * coercion * * *."[43]

Second, the plaintiffs argue that, as in *Nash*, Congress intended to pre-empt state laws in conflict with the guarantee that employees could "assist" their unions. Therefore,

> *"Nash* * * * is clearly dispositive here: just as Florida was forbidden in *Nash* to interfere with the protected right to complain to the NLRB by denying unployment benefits to those who do so, Michigan may not deny unemployment insurance benefits when the effect of that denial is to impair the right, also protected under the NLRA, to pay dues to a union * * *."[44]

However, we disagree with the plaintiffs' assertion that *Nash* is controlling in this case. We do so because *Nash* involved the right of employees to make claims to the NLRB. Regarding that specific right, the United States Supreme Court held that there was no congressional intent to tolerate a conflict between a state law and the exercise of the federal right to report to the NLRB. However, the United States Supreme Court's holding is not so broad as to support the plaintiffs' assertion that it covers this case. In *Nash*, the United States Supreme Court did *not* hold that Congress did not intend to tolerate any conflict between a state law and any § 7 or § 8 NLRA right. Instead, it stated a specific finding concerning the right of employees to file complaints with the NLRB. Therefore, contrary to the plaintiffs' assertions, while

[43] Plaintiffs-Appellants' Supplemental Brief (1979), p 17.
[44] Plaintiffs-Appellants' Supplemental Reply Brief (1979), p 6.

Nash provides guidance to this Court, *Nash* is not controlling since it says nothing concerning a state unemployment compensation disqualification of persons who financed the labor dispute which caused their unemployment, and it says nothing about congressional intent concerning financial disqualifications from unemployment benefits for paying extraordinary dues.

Citing *New York Telephone, supra*, the defendant claims that there is controlling United States Supreme Court authority supporting the defendant's position. In *New York Telephone,* the claimants were striking telephone company workers who, according to New York state law, were entitled to unemployment benefits after a waiting period. The telephone company asserted that the state law providing benefits to striking workers was a violation of the Supremacy Clause since it was required to bear the major share of the financial burden of paying striking workers unemployment benefits. This, the company asserted, violated the NLRA which was intended to allow competing parties to decide a labor dispute according to "the free play of economic forces in the collective bargaining process." *New York Telephone, supra,* p 526. However, the State Department of Labor awarded unemployment benefits to the striking workers.

The telephone company challenged the award of benefits in the federal district court on the basis that the state law was pre-empted by the federal labor law. The district court held that the availability of unemployment benefits was a substantial factor affecting whether workers were willing to go out on strike and, once there, were willing to stay on strike. This obviously affected the balance of economic forces in the collective bargaining process and conflicted with the federal policy of free collective bargaining. Therefore, the district court declared that the federal labor relations law pre-empted the state unemployment law. The claimants then appealed to the United States Court of Appeals which reversed the district court's decision. The Court of Appeals held that the conflict

identified by the district court did in fact exist, but that the conflict was one which the Congress intended to tolerate as indicated in the legislative histories of the NLRA and Title IX of the Social Security Act. See 26 USC 3301 *et seq.*, 42 USC 501 *et seq.*, and 46 USC 1101 *et seq.* The telephone company appealed the case to the United States Supreme Court.

By a plurality decision, the United States Supreme Court affirmed the Court of Appeals decision. Justice Stevens, joined by Justices White and Rehnquist, began his opinion by distinguishing this case from some earlier United States Supreme Court labor relation pre-emption cases. First, this case did not involve conduct arguably protected by § 7 or § 8 of the NLRA. Second, it did not involve a state attempt to regulate labor relations; instead, it involved a state program for the distribution of state benefits. Therefore, since the challenged law was a state law of general applicability which implemented a broad state policy in an area of important local interest, it was presumed that Congress did not intend to deprive the state of the authority to so act. Here, rather than a compelling congressional direction precluding state action in conflict with the federal labor relations laws, Congress omitted any direction indicating that it was depriving the state of the authority to make unemployment benefit payments to striking workers. In fact, there is considerable indication that Congress was aware of the conflict and chose to tolerate it.

Justice Brennan agreed with Justice Stevens' result, but did not agree with his analysis. Instead of distinguishing the earlier cases and presuming congressional intent to tolerate the conflict unless otherwise shown, Justice Brennan held that the legislative histories of the NLRA and the Social Security Act provided sufficient evidence that Congress did not intend to pre-empt states from paying unemployment compensation benefits to strikers. Therefore, he preferred to leave the burden of proof on the party that asserts that Congress intended to tolerate the conflict.

Justice Blackmun, joined by Justice Marshall, also agreed with the conclusion reached by Justice Stevens but disagreed with Justice Stevens' analysis. Like Justice Brennan, they felt that, where a conflict existed with a state act which curtails the free economic relationship of parties to a labor dispute, the state law is pre-empted *unless* there is evidence that Congress intended to tolerate the conflict. In this case, notwithstanding the conflict between the federal and the state law, the legislative histories of the NLRA and the Social Security Act provide sufficient evidence that Congress intended to tolerate this conflict.

Justice Powell, joined by Chief Justice Burger and Justice Stewart, dissented. They held that the state law distorted the federal labor relations policy of protecting free collective bargaining from state intervention. They did not find a clear legislative intent to tolerate the conflict in this case and therefore they would have held that the state law was pre-empted by the federal law.

Upon the basis of this holding, the defendant asserts that "[s]ix members of the Court agreed that Congress had decided to tolerate any interference by state law with federal labor policy in the area of unemployment compensation."[45] Therefore, the defendant states that this Court can draw only one conclusion from the *New York Telephone* case and that conclusion is that it controls the pre-emption issue before the Court:

> "The only conclusion that can be derived from the opinion, as it applies to the federal preemption issue before this court, is that state law is *not* preempted by federal law in the area of authorizing or prohibiting unemployment insurance benefits to strikers * * *."[46]

The defendant's assertion, however, is overbroad, just as the plaintiffs' assertion was overbroad. In *New York Telephone*,

---

[45]Defendants-Appellees' Supplemental Brief (1979), p 3.
[46]Defendants-Appellees' Supplemental Brief (1979), p 7.

the United States Supreme Court took pains to note that the case did not involve any rights arguably protected by § 7 or § 8 of the NLRA. By so doing, they implicitly noted that a different result or conclusion may be required where a party asserts a § 7 or § 8 NLRA right. Therefore, we reject the defendant's assertion that "this Court should feel safe in concluding that a lesser issue, the denial of unemployment insurance benefits to those who support a strike will likewise not offend federal labor policy."[47] Instead, we believe it is necessary to review this case in light of its specific facts: first, the plaintiffs allege a conflict between a state law and a federal right protected by § 7 or § 8 of the NLRA; second, the challenged state law disqualifies those who are directly involved in a labor dispute, through financing, from receiving state unemployment benefit. In such a specific case, we must undertake a careful analysis and not merely rely upon distinguishable United States Supreme Court cases.

C

A careful analysis requires that we apply the two-step analysis used by the United States Supreme Court in *Nash* and *New York Telephone* to the facts of this case. The first step is to identify the allegedly conflicting federal and state laws and to ascertain that there is *in fact* a conflict between the two laws. If we find that a conflict does in fact exist between the federal law and the state law, we must then determine whether Congress intended to tolerate the conflict between the federal law and the state law. In the course of this analysis, we must not forget that the issue raised by the plaintiffs is specific: does the financing disqualification of MESA § 29(8)(a)(ii) which disqualified the plaintiffs for financing the labor dispute which caused their unemployment conflict with the NLRA § 7 and § 8 rights of employees to "assist" their union and, if so, did Congress intend to tolerate

[47] Defendants-Appellees' Supplemental Brief (1979), p 7.

such a conflict or is the MESA § 29(8)(a)(ii) financing disqualification pre-empted by the federal constitution's Supremacy Clause?

1

The federal right asserted by the plaintiffs is found in § 7 and § 8 of the NLRA. Section 7 of the NLRA states.

> "Employees shall have the right to * * * assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 USC 157.

Additionally, the plaintiffs assert that the right to assist a labor union and engage in concerted activities is protected by § 8 of the NLRA which makes the violation of § 7 rights an unfair labor practice. 29 USC 158. The NLRA nowhere defines the term "assist." However, it would be inconsistent with the broad statement of rights contained in § 7 of the NLRA to define the term "assist" without including financial assistance. Additionally, such an interpretation would be inconsistent with the legislative history of the NLRA which indicates that the NLRA was intended to encourage union member financial support of labor unions and to prohibit employer financial support of labor unions.[48] Therefore, it is clear that § 7 of the NLRA protects the right of employees to *financially* "assist" their unions and that such protection is within the purpose of the NLRA.

The plaintiffs identify MESA § 29(8)(a)(ii) as the state law in conflict with the federal labor relations statute. MESA § 29(8)(a)(ii) contains a "financing" disqualification which prohibits a claimant who "finances" the labor dispute which causes the claimant's unemployment from receiving unemployment compensation. Such a financing disqualification, according to the plaintiffs, interferes with their federally protected right to assist their labor union. Therefore, the plaintiffs assert that

[48] H Rep 972, 74th Cong 1st Sess, 16 (1935); 79 Cong Rec 7570, 9684, 9699, 74th Cong 1st Sess (1935).

MESA § 29(8)(a)(ii) conflicts with the federal relations law as expressed in § 7 and § 8 of the NLRA.

We agree with the plaintiffs that a conflict does in fact exist between the NLRA and the MESA. The conflict is not so great that the MESA prohibits the right to "assist" guaranteed in the NLRA. But the MESA disqualification does affect the exercise of the right to "assist" guaranteed in the NLRA. Therefore, having found that a conflict exists, we must proceed to the second step of this pre-emption analysis.

2

In determining whether Congress intended to tolerate the conflict between § 7 and § 8 of the NLRA and § 29(8)(a)(ii) of the MESA, we must take our cue from the differing opinions of the justices in *New York Telephone*.[49]

a

We begin by determining which party bears the burden of establishing the congressional intent and what congressional intent must be established. As a general rule, the party seeking to uphold the conflicting state law must establish that the Congress intended to tolerate the conflict. However, the United States Supreme Court has recognized exceptions to this rule. *In San Diego Building Trades Council* v *Garmon*, 359 US 236, 244; 79 S Ct 773; 3 L Ed 775 (1959), the United States Supreme Court held that the burden was upon the party asserting that the challenged state law was pre-empted to show that Congress intended to prohibit the conflict where the state law involves an aspect of labor relations "conduct touch[ing] interests so deeply rooted in local feeling and responsibility

[49] While we look to *New York Telephone* for guidance, we continue to reject the defendants' assertion that it provides controlling precedent for this case. *New York Telephone* involved no § 7 or § 8 NLRA rights, and no majority of the United States Supreme Court found either that Congress intended to tolerate conflicts between § 7 or § 8 of the NLRA and state unemployment compensation laws or that Congress should be presumed to tolerate such conflicts barring evidence to the contrary.

that * * * we could not infer that Congress had deprived the States of the power to act."

We hold that the burden is upon the defendant to show that Congress intended to tolerate the conflict caused by the challenged state law; it is not upon the plaintiffs to show that Congress intended to prohibit the conflict caused by the challenged state law. We draw this conclusion from the four opinions in *New York Telephone*. Justice Stevens, joined by Justices White and Rehnquist, in the lead opinion, did not specifically state that the definition of unemployment benefit eligibility was a matter of "local feeling and responsibility," but he did state that it was appropriate to treat such a state law with the deference due to a state law touching upon a matter of local feeling and responsibility:

> "It is therefore appropriate to treat New York's statute with the same deference that we have afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.' With respect to such laws, we have stated 'that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.'" *New York Telephone, supra*, pp 539-540.

Justice Brennan found "substance" in Justice Stevens' treatment of the "local feeling and responsibility" exception as applied to this case but did not specifically adopt it. *New York Telephone*, pp 546-547. Justice Blackmun, joined by Justice Marshall, specifically refused to adopt Justice Stevens' interpretation of the "deeply rooted in local feeling and responsibility" exception and stated that state statutory definitions of unemployment compensation eligibility did not fall within the "deeply rooted in local feeling and responsibility" exception. *New York Telephone*, pp 550-551. Justice Powell, joined by Chief Justice Burger and Justice Stewart, held that the "deeply rooted in local feeling and responsibility" exception had nothing to do with state unemployment compensation laws because

such laws had "nothing in common with the state laws protecting against personal torts or violence to property." *New York Telephone*, p 560. Therefore, a majority of the members of the United States Supreme Court held that a state law defining eligibility for unemployment compensation benefits did not fall within the "deeply rooted in local feeling and responsibility" exception so as to shift the burden to show that Congress intended to pre-empt rather than intended to tolerate the conflict. The defendant therefore bears the burden of showing that Congress intended to tolerate the conflict which exists between § 7 and § 8 of the NLRA and § 29(8)(a)(ii) of the MESA.

b

In evaluating congressional intent concerning the conflict between §§ 7 and 8 of the NLRA and § 29(8)(a)(ii) of the MESA, we must review two federal statutes. First, we must review the language and legislative history of the NLRA from which the plaintiffs claim a federal right. Second, we must review the Social Security Act of 1935 (SSA) which affects the MESA. From these two sources, we must determine whether Congress intended that "assist[ance]" under the NLRA prohibits a financing disqualification under the MESA.[50]

Congress passed the NLRA on July 5, 1935.[51] Through § 7, it declared the right of employees to "assist" their unions. However, it did not define or explain what it meant by the term "assist" and there was absolutely no discussion of a "financing" disqualification under a state unemployment compensation statute. Such congressional silence is understand-

[50] As members of the United States Supreme Court noted in *New York Telephone*, the issue raised in this case could be treated not as a pre-emption issue but rather as a conflict between two federal acts, the NLRA and the Social Security Act. However, they treated it as a pre-emption issue since it was phrased that way and since the analysis was the same regardless of how the issue was phrased. The issue before the Court is whether the Congress intended to tolerate the conflict in either case.

[51] 29 USE 151 *et seq.*

able if viewed from the perspective of July, 1935. Only five states had unemployment compensation statutes in July, 1935, and these states split over whether to provide benefits to strikers; Congress made no explicit choice between the statutes when it passed the NLRA.[52] Therefore, the NLRA is silent concerning whether it intended to tolerate a conflict between the NLRA §§ 7 and 8 right to "assist" and a state unemployment compensation law which disqualifies union members who "financed" the strike which caused their unemployment. Consequently, we find no indication in the NLRA that the Congress intended to tolerate the conflict complained of in this case.

However, at the same time that Congress was considering the NLRA, it was also considering the SSA, which it passed on August 14, 1935, several weeks after the NLRA.[53] Unlike the NLRA, the SSA and its surrounding legislative history contain many indications of congressional intent concerning toleration of the conflict challenged in this case. First, the report surrounding the passage of the SSA contain numerous statements that the SSA leaves the states with great latitude to determine who is to receive unemployment benefits and the amount of those benefits. For example, the Senate report on the SSA said:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington."[54]

Additionally, the Senate Committee on Economic Security produced a report on the SSA which was sent to the President

[52] *New York Telephone, supra*, pp 540-541.

[53] Social Security Act of 1935, 49 Stat 620; 42 USC 301 *et seq.*

[54] S Rep No 628, 74th Cong, 1st Sess, 13 (1935).

and which became the cornerstone of the SSA. In that report the committee said:

> "The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters in which uniformity is not absolutely essential should be left to the States."[55]

The committee also said that the states should have wide discretion in determining benefits and eligibility for benefits:

> "Benefits — The States should have freedom in determining their own waiting periods, benefit rates, maximum benefit periods, etc."[56]

The section does not contain any limitation stating that benefits must be paid to persons financing the strike which caused their unemployment. The only conclusion that can be drawn from these materials is that Congress intended to provide the states with very wide discretion and considerable autonomy in establishing and regulating their unemployment compensation systems. This state autonomy has been recognized by the United States Supreme Court in several cases, including *New York Telephone, supra,* p 542, where it was said that "the scheme of the Social Security Act has always allowed the states great latitude in fashioning their own programs." Therefore, it is very clear that the Congress intended the states to have almost complete control over their unemployment compensation programs.

Second, Congress repeatedly debated the issue of paying unemployment benefits to strikers during the course of the larger SSA debate. The emphasis of that debate was not directed toward allowing strikers to receive benefits. Instead,

[55] Report of the Committee on Economic Security, as reprinted in Hearings on S 1130 before the Senate Committee on Finance, 74th Congress, 1st Sess p 1326 (1935).

[56] *Id.*, p 1327.

there was considerable support for a provision to prohibit states from paying unemployment benefits to strikers. Those provisions were ultimately excluded from the SSA because it was felt that states should be free to decide the issue for themselves.[57] However, the Congress, in an exercise of its "state-like" authority over the District of Columbia, provided for a disqualification of strikers from receiving unemployment benefits.[58] Therefore, Congress indicated that it did not consider the rights mentioned in § 7 of the NLRA involving a right to strike as prohibiting a conflicting disqualifying provision of the "state" unemployment compensation law. While this does not speak specifically to a financing disqualification, it remains relevant to Congress' intent concerning § 7 NLRA rights and state unemployment compensation laws. Additionally, since the Michigan law only disqualifies those who are directly involved in the labor dispute through financing, the MESA essentially only disqualifies "strikers" and is analogous to the Congress' District of Columbia unemployment compensation statute.

Third, the SSA did not mandate that states implement unemployment compensation programs. Rather, it created a system of financial and tax benefits for complying states. However, states were in a position to claim those benefits only if they complied with the SSA which Congress had intentionally written without specific guidance so as to allow states discretion. Therefore, to assist the states in writing acceptable state unemployment compensation laws, the Social Security Board (which was established by the SSA) issued draft bills for use by state legislatures.[59] These bills were not "model" bills because the Congress wanted to leave the states great authority to develop their own unemployment compensation programs

[57] *New York Telephone, supra,* p 545.

[58] Act of August 28, 1935, ch 794, § 10(a); 49 Stat 950.

[59] Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types (1936).

without federal pressure, even the limited pressure of a federal "model" bill. The draft bill specifically provided that persons could be disqualified for direct involvement in a labor dispute which caused their unemployment. Section 5(d) of the draft bill states:

> "For any week in which it is found by the commission that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that: (1) He is not participating in or *financing* or directly interested in the labor dispute * * *; and (2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or *financing* or directly interested in the dispute."[60] (Emphasis added.)

The draft bill clearly found a financing disqualification to be consistent with the congressional intent expressed in NLRA §§ 7 and 8. Therefore, it is not without significance that the most pertinent draft bill language is repeated almost verbatim in the MESA.[61]

Fourth, it is relevant in assessing congressional intent concerning toleration of a conflict between the MESA and the NLRA that, during the nearly 50 years that followed the passage of the NLRA and the SSA, many states have passed legislation disqualifying persons who finance the labor dispute which causes their unemployment. Congress has never, in the course of its amendments of the NLRA and the SSA, spoken

[60] *Id.*, § 5(d).

[61] MESA § 29(8)(a)(ii) provides: "He is participating in or financing or directly interested in the labor dispute * * *."

to this conflict. Therefore, it is logical to assume that Congress intended to tolerate the conflict as it exists.

We find that the above four factors indicate that Congress intended to tolerate the conflict which exists between the NLRA, §§ 7 and 8, and the MESA, § 29(8)(a)(ii). Therefore, we conclude that the NLRA does not pre-empt the MESA and that the MESA is not invalid as violative of the Supremacy Clause of the federal constitution.

3

The plaintiffs also claim that MESA § 29(8)(a)(ii) interferes with the internal decisions of the plaintiffs' union under NLRA § 8. It is clearly not the intent of MESA § 29(8)(a)(ii) to do so. To the extent that a conflict exists, we believe that the Congress intended to tolerate such peripheral effect when it indicated its toleration of state unemployment laws containing financial disqualification clauses. Therefore, as above, we conclude that the NLRA does not pre-empt the MESA and that the MESA is not invalid as violative of the Supremacy Clause of the federal constitution.

IV

The plaintiffs' final contention is that the board disqualified them in violation of their First Amendment rights of association. However, their argument in support of this contention has two flaws. First, it is outdated since it is based upon the facts of the case as they stood before this Court decided *Baker, supra.* Second, the plaintiffs cite First Amendment freedom of religion cases to support their First Amendment freedom of association argument. The Court can quickly dispose of both arguments.

The plaintiffs' reliance upon outdated facts results from their adoption of the freedom of association argument in the 1977 amicus brief of the United Steelworkers.[62] At that time, the appeal board had applied the financing disqualification of MESA § 29(8)(a)(ii) to any payment of non-ordinary strike

[62] Plaintiffs-Appellants' Brief, p 55.

fund dues without consideration of whether a meaningful connection existed between the financing and the labor dispute which caused the claimant's unemployment. Therefore, the plaintiffs, through the United Steelworkers amicus brief, argue that the statutory disqualification "as *interpreted and applied*" by the appeal board and the Court of Appeals has no rational connection to the state interest sought to be achieved by the financial disqualification section, the disqualification of persons who are not "involuntarily" unemployed because they financed the labor dispute which caused their unemployment.[63] However, they did not argue that MESA § 29(8)(a)(ii) was unconstitutional on its face but, rather, acknowledged that "Section 29(8)(a)(ii) *as written* satisfied the test of constitutionality."[64] They made this acknowledgment because they correctly recognized that this case involves "regulation in the social and economic field."[65] Because of this, the state needed only a rational basis for the "legislative classification made in Section 29(8)(a)(ii)" to defeat their freedom of association challenge and such a rational basis clearly existed in this case.[66] Therefore, the plaintiffs, through the adoption of the United Steelworkers amicus brief, merely argue for an interpretation of the MESA, § 29(8)(a)(ii), which makes the financial disqualification compatible with the general purpose of the MESA, which only disqualifies those whose financing of the labor dispute which caused their unemployment made their unemployment "voluntary" under the statute. This the Court has already done by remanding the case to the review board and requiring a meaningful connection between the financing and the labor dispute which caused the claimant's unemployment. Having interpreted the MESA financial disqualification more narrowly, there is no longer any risk that it violates the First Amendment

[63]United Steelworkers Amicus Brief, p. 7.
[64]United Steelworkers Amicus Brief, p. 7.
[65]United Steelworkers Amicus Brief, p. 7.
[66]United Steelworkers Amicus Brief, p. 7.

freedom of association by "needlessly burden[ing] unionization."[67] Instead, MESA § 29(8)(a)(ii) is constitutional as written and as applied. As the plaintiffs note in their adopted brief, it is well-settled law "under *Dandridge [v Williams,* 397 US 471; 90 S Ct 1153; 25 L Ed 2d 491 (1970)] * * * that the State of Michigan can condition its grant of unemployment compensation benefits so as to disqualify those who knowingly finance the labor dispute which causes their unemployment."[68] Therefore, the statute having been interpreted narrowly and the plaintiffs having recognized the constitutional validity of the MESA, § 29(8)(a)(ii), as written, this argument provides no basis for relief.

The plaintiffs' second freedom of association argument is that the state, in disbursing unemployment benefits, may not put claimants to a "hard choice." In support of this argument, the plaintiffs cite two cases: *Sherbert* v *Verner*, 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), and *Thomas* v *Review Board of the Indiana Employment Security Division,* 450 US 707; 101 S Ct 1425; 67 L Ed 2d 624 (1981). While both cases involve claimants for unemployment benefits who raise First Amendment objections to their disqualification from such benefits, neither case involves First Amendment freedom of association. Instead, both cases involve claimants who either lost or left employment because it conflicted with their religious beliefs. As such, both cases involve First Amendment freedom of religion. In this case, no plaintiff has asserted a violation of his freedom of religion. Therefore, since freedom of religion has traditionally been treated very differently from economic and social freedom of association, these cases are not relevant to the issue raised by the plaintiffs and provide no basis for relief.

Additionally, we note another reason for rejecting the plaintiffs' First Amendment freedom of association argument. The plaintiffs did not present any evidence that any one of

[67]United Steelworkers Amicus Brief, p. 8.
[68]United Steelworkers Amicus Brief, p. 8.

them was dissuaded from exercising his First Amendment right or even that any of them considered the MESA § 29(8)(a)(ii) financial disqualification as impinging upon their First Amendment rights. Therefore, there is no factual basis upon which the Court could grant any relief.

Therefore, finding neither of the plaintiffs' First Amendment freedom of association arguments applicable to this case as it presently exists, we find no violation of the plaintiffs' First Amendment freedom of association rights.

V

The Board of Review properly held that the plaintiffs were disqualified from receiving unemployment benefits by MESA § 29(8)(a)(ii). The plaintiffs financed the labor dispute which caused their unemployment and there was a meaningful connection between the plaintiffs' financing and the labor dispute which caused their unemployment. MESA § 29(8)(a)(ii), as written and applied, is constitutional. It violates neither the federal constitution's Supremacy Clause nor the First Amendment to the federal constitution.

The decision of the Board of Review is affirmed.

Brickley and Cavanagh, JJ., concurred with Ryan, J.

Williams, C.J. (*concurring in part and dissenting in part*). I concur with most of the rational of my brother Ryan's opinion, but not necessarily with the conclusion. I dissent, however, from that part of his opinion found in Part II(C)(2)(b), "Third," establishing an accounting principle for considering "the effect of the 'emergency' dues upon the resources of the union allocated to supporting labor disputes" (Slip Opinion, p 29). The accounting principle I disagree with is stated (Slip Opinion, p 30) as follows:

> "As applied to the UAW's SIF, which is composed of payments from both regular and emergency sources, payments from the fund should be considered to be composed of the same percentage of regular dues and emergency dues as the larger fund."

On the surface, as Justice Ryan writes, such an approach seems fair and logical. However, the fact of the matter is that, if this formula is applied, there will always remain a percentage of the commingled fund that relates to the "emergency" dues until the end of time unless the fund drops to zero in the interim. This is neither fair nor, I am sure, intended by the Legislature.

As a consequence, I would adopt a Last-In-First-Out (LIFO) formula for three reasons. First, the LIFO formula would relate the voting and contribution of the "emergency" dues more proximately to the distribution of an equivalent amount of money distributed in strike benefits subject to triggering disqualification from unemployment compensation than either the Justice Ryan formula or the First-In-First-Out (FIFO) formula. Second, the LIFO formula would not inflate the duration of "emergency" dues payments subject to disqualification by the totally irrelevant factor of the size of the prior properly constituted strike fund as the Justice Ryan formula does. For example, under the Justice Ryan formula if there were a prior strike fund equal to the size of the "emergency" dues payments, the disqualification would last twice as long (during the payment of twice as many strike benefit dollars) as it would if there had been no strike fund. This has the curious effect of increasing exposure to disqualification in inverse order to the comparative amount of "emergency" dues. Third, the LIFO formula does not perpetually taint the strike fund as the formula Justice Ryan has adopted would do. When the last cent of "emergency" dues is spent, there would no longer be the possibility of a financing disqualification.

In passing, the other discussed formula, the FIFO formula is not as fair as the LIFO formula. To begin with, it requires the payment of strike benefits first out of moneys deposited in the fund prior to the commingling of the "emergency" dues. This means the payment of strike funds would be made out of the least proximately concerned moneys. Second, if the strike

fund were large enough, the emergency might pass without the "emergency" dues being touched. This could also mean that the "emergency" dues would be paid out at a later date when they would disqualify unreasonably or relieve the "emergency" dues from ever disqualifying. Neither alternative would seem to be what the Legislature had in mind.

In conclusion, I would remand this matter to the Board of Review to determine whether, using a LIFO formula, any amount of "emergency" funds beyond a *de minimis* amount, actually financed strike benefits for the striking workers in the GM plants supplying plaintiffs' plants. If there were no such funds, benefits should be paid. If there were such funds, there would be disqualification pursuant to Justice Ryan's opinion.

Levin, J., concurred with Williams, C.J.

Boyle, J., *(concurring)* I concur with Chief Justice Williams as to the accounting formula that should be applied to determine whether plaintiffs' were properly disqualified from receiving unemployment benefits for "financing" the labor dispute which caused their unemployment. Because the Court has adopted "temporal proximity" as a factor to be considered in determining whether there was a "meaningful connection" between the plaintiffs' emergency dues payments and the labor dispute that caused their unemployment, I agree with Chief Justice Williams that the LIFO formula provides the fairest[1] means of evaluating the issue.

Kavanagh, J., took no part in the decision of this case.

[1]As opposed to either the FIFO or Justice Ryan's "proportionality" formulae.

BAKER v GENERAL MOTORS CORPORATION
COLLIER v GENERAL MOTORS CORPORATION
SEIDELL v GENERAL MOTORS CORPORATION

Docket Nos. 59861-59863. Argued January 10, 1979 (Calendar No. 8). — Decided October 16, 1980.

LEVIN, J. The issue in this case is whether the payment by union members of temporarily increased "emergency dues", authorized by an amendment to the union constitution, required as a condition of union membership and collected in designated amounts as part of the members' monthly dues, into a union strike fund during an ongoing national strike against another employer, disqualifies those members from receiving unemployment compensation benefits when they subsequently become unemployed because local issue strikes in other establishments operated by their employer result in layoffs at the members' own establishments, and when the local issue strikers at the other establishments receive strike benefits from the fund into which the "emergency dues" were paid.

Plaintiffs are members of a national union representing workers in the automobile industry and were employed at General Motors plants in Michigan in early 1968. When plaintiffs were laid off in the wake of local strikes at other GM plants, their eligibility for unemployment benefits was contested because of certain dues payments they had made to their union strike fund several months before, in the midst of a national strike against Ford Motor Company.

The controversy arises under the labor dispute disqualification provision of the Michigan Employment Security Act,[1] subsection 29(8),[2] which, at the time, provided in pertinent part:

> "(8) An individual shall be disqualified for benefits for any week with respect to which his total or partial

[1]MCL 421.1 *et seq.*; MSA 17.501 *et seq.*
[2]MCL 421.29(8); MSA 17.531(8).

unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified this subsection 29(8) if he is not directly involved in such dispute.

"(a) For the purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:

* * *

"II. He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph * * *." 1967 PA 254.[3]

[3]1974 PA 104 added a new sentence and, along with 1975 PA 110, made minor changes in wording and punctuation of this subsection. The quoted portion of the statute now reads:

"An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by that labor dispute, in the establishment in which he is or was last employed, or to a labor dispute, other than a lockout, in active progress, or to shutdown or start-up operations caused by that labor dispute, in any other establishment within the United States which is functionally integrated with the establishment within the United States which is functionally integrated with the establishment and is operated by the same employing unit. An individual's disqualification imposed or imposable under this subsection shall be terminated by his performing services in employment with an employer in at least 2 consecutive weeks falling wholly within the period of his total or partial unemployment due to the labor dispute, and in addition by earning wages in each of those weeks in an amount equal to or in excess of his actual or potential weekly benefit rate with respect to those weeks based on his employment with the employer involved in the labor dispute. An individual shall not be disqualified under this subsection if he is not directly involved in the dispute.

"(a) For the purposes of this subsection an individual shall not be deemed to be directly involved in a labor dispute unless it is established that:

* * *

"(ii) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute within the meaning of this subparagraph * * *." MCL 421.29(8); MSA 17.531(8).

The application of subsection 29(8) to the facts of this case potentially raises three connected questions:

(1) Was plaintiffs' unemployment "due to" labor disputes in active progress at other establishments operated within the United States by the same employing unit and functionally integrated with the establishments where plaintiffs were employed?

(2) If so, were plaintiffs' emergency dues payments to the strike fund sufficiently connected with the labor disputes which caused their unemployment to constitute "financing" of those labor disputes unless excepted by the terms of subparagraph 29(8)(a)(II)?

(3) If so, are plaintiffs' temporary emergency dues payments excepted from the category of "financing" because they were "regular union dues (in amounts and for purposes established prior to the inception of such labor dispute)"?

We conclude that plaintiffs' unemployment was due to labor disputes in active progress at functionally integrated domestic GM plants. The basic disqulification provision of subsection 29(8) disqualifies an individual whose unemployment is claimed to result from a labor dispute if that labor dispute is shown to be a substantial contributing cause of his or her unemployment. While the Legislature did not intend to withhold benefits from

individuals who would have been unemployed even if an apparently related labor dispute had not occurred, the dispute need not be the sole cause of the unemployment.

Before considering whether the emergency dues payments may be regarded as having financed the labor disputes that caused plaintiffs' unemployment, we seek to determine whether those payments are specifically exempted from treatment as financing by the second sentence of subparagraph 29(8)(a)(II). We agree with the Court of Appeals that that provision requires union dues to satisfy two conditions in order to be exempted as a matter of law from possible classification as financing a labor dispute: the dues must be (1) regular and (2) in amounts and for purposes established prior to the inception of the labor dispute that caused the claimant's unemployment.

We further agree with the Court of Appeals that the temporary emergency dues paid by UAW members in October and November were not "regular" but extraordinary. The Legislature chose the term "regular" to exclude from possible treatment as financing those dues payments required uniformly of union members and collected on a continuing basis without fluctuations prompted by the exigencies of a particular labor dispute or disputes. The payments in question, enacted as a temporary emergency measure to build the union strike fund in the midst of a national strike against Ford Motor Company, cannot properly be described as "regular". We therefore need not decide whether the emergency dues were established "prior to the inception of [the] labor dispute".

The referee, the appeal board and the Court of Appeals all implicitly assumed that unless the emergency dues payments fell within the specific exemption for "regular union dues (in amounts and for purposes established prior to the inception of such labor dispute)" the payments would constitute financing because the union strike fund had paid strike benefits to workers involved in the labor disputes that caused plaintiffs' unemployment.

The determination that the emergency dues payments are not exempted from treatment as financing by the second sentence of subparagraph 29(8)(a)(II) does not, however, require the conclusion that plaintiffs financed the local labor disputes which caused their unemployment.

Since the appeal board, the tribunal with the most experience and expertise in the application of the act, did not discuss the meaning of "financing", we remand this matter to the board's successor for further explication of the term "financing".

In supplemental briefs filed after oral argument, the parties have addressed the question whether federal labor policy prohibits a state from disqualifying union members for unemployment compensation benefits because they have made required payments into a union's general strike fund. We do not decide whether the federal labor law preempts the application of the "financing" disqualification of the Employment Security Act because the construction given the term "financing" after remand may make it unnecessary to address the federal preemption issues.

We retain jurisdiction.

I

Every three years the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and the three major automakers (General Motors, Ford and Chrysler) negotiate new national collective bargaining agreements. The case has its roots in events contemporaneous with and subsequent to the 1967 automobile industry contract negotiations.

In June, 1967, the UAW notified each of the three major automakers by letter of its intent to terminate all national and local bargaining agreements when they expired on September 6, 1967. GM and the UAW began negotiations toward a new national agreement on July 15, 1967.

In a vote taken during the latter part of August, the UAW's

GM membership authorized strikes, if necessary, on national and local issues. However, the expiration of the agreements did not immediately result in strikes at GM plants because Ford, not GM, was selected as the strike target for that year.

On October 8, 1967, while a nationwide UAW strike against Ford was in progress, a special UAW convention amended article 16 of the union's constitution to provide for "emergency dues".[4] The new dues, effective immediately and continuing "during the current collective bargaining emergency as determined by the International Executive Board and thereafter, if necessary, until the International Union Strike Insurance Fund has reached the sum of Twenty-Five Million Dollars ($25,000,000)", increased each member's monthly contribution to the union Strike Insurance Fund from $1.25 to $11.25 or $21.25, depending upon the average hourly wage at the member's plant. After the emergency ended or the $25,000,000 goal was reached, each member's monthly dues would consist of two hours' "straight time" pay, with 40% earmarked for the member's local union and 30% each allocated to the International Union's Administrative and Strike Funds.

UAW members employed at GM plants in Michigan, including each of the plaintiffs, paid the emergency dues in October and November, 1967.

On November 30, 1967, the UAW determined that there would be no nationwide strike at GM plants during December, 1967 and waived collection of the emergency dues during December, 1967 and Janaury, 1968. However, the letter informing GM of the waiver noted that "the collective bargaining emergency is not yet ended".[5]

The UAW and GM reached agreement on all national issues by December 15, 1967. Following ratification by the membership, the new national agreement took effect on January 1, 1968. However, local bargaining issues at a number of plants remained unresolved.

---

[4]The text of the amendments reads, in pertinent part:

"Article 16

"Section 2(a).

"Emergency Dues

"All dues are payable during the current month to the Financial Secretary of the Local Union.

"Commencing with the eighth (8th) day of October 1967 until October 31, 1967, and for each month thereafter *during the emergency* as defined in the last paragraph of this Subsection, Union administrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be as follows:

"1. For those working in plants where the average straight time earnings * * * is three dollars ($3.00) or more, twenty-one dollars and twenty-five cents ($21.25) per month.

"2. For those working in plants where the average straight time earnings * * * is less than three dollars ($3.00), eleven dollars and twenty-five cents ($11.25).

* * *

"This schedule of dues shall remain in effect *during the current collective bargaining emergency as determined by the International Executive Board and thereafter, if necessary, until the International Union Strike Insurance Fund has reached the sum of twenty-five million dollars ($25,000,000), at which time the dues structure established in 2(b), below, shall become effective.*" (Emphasis supplied.)

Section 2(b) provided in part:

"All dues are payable during the current month to the Financial Secretary of the Local Union. *Commencing with the month following the emergency as set out in Seciton 2(a) and for each month thereafter, minimum Union dues shall be a sum equivalent to two hours straight time pay per month* * * *.

"Dues income shall be distributed so that the Local Union shall receive forty (40) per cent; the International Union Strike Insurance Fund shall receive thirty (30) per cent and the General Administrative Fund of the International Union shall receive thirty (30) per cent." (Emphasis supplied.)

[5]The letter stated in part:

"We would like to advise you that the International Executive Board, at a meeting held November 30, 1967, determined that there would not be a strike at General Motors Corporation plants in the United States and Canada *at least during the month of December, 1967,* that the collective bargaining emergency could be determined to be *in suspension* and, therefore, the emergency dues would be waived for the month of December, 1967, and the month of January, 1968.

"Since, obviously, the collective bargaining emergency is not yet ended, the dues program is reverting to the basic five dollars ($5.00) per month in effect prior to the October 8, 1967, Convention, and *not going to the permanent dues program* of two hours' pay per month." (Emphasis supplied.)

During January, 1968, GM foundries at Saginaw, Michigan; Defiance, Ohio; and Tonawanda, New York, were each shut down for approximately 10 days because of strikes called by the UAW over local issues. It is stipulated that the striking UAW members at these establishments received strike benefits from the strike fund in which the emergency dues collected in October and November were deposited. The local strikes at the foundries were followed by shutdowns or cutbacks in production at 24 other GM plants in Michigan and over 19,000 workers, including the plaintiffs, were laid off from their employment in the affected plants.

The Michigan Employment Security Commission approved plaintiffs' applications for unemployment compensation benefits. GM appealed to a hearing referee who reversed the Commission's decision and ruled that plaintiffs were disqualified under subsection 29(8) of the Michigan Employment Security Act because they had financed the labor disputes which caused their unemployment.[6] The referee found that plaintiffs' increased contributions to the union's strike fund during October and November, 1967 were not "regular union dues" within the meaning of the subparagraph 29(8)(a)(II) exception because they were not "in amounts and for purposes established prior to the inception of such labor dispute". The referee's opinion did not discuss what activities were intended to fall under the heading of "financing" but, rather, implicitly assumed that the dues in question were financing unless expressly exepted by the statute.

The Michigan Employment Security Appeal Board agreed

[6]The referee who heard the consolidated appeals on plaintiffs' claims took testimony in regard to the circumstances surrounding the layoffs at each plant and rendered separate decisions on the claims filed by the employees of each plant. Some layoffs could not be traced to the labor disputes at the foundries but, instead, were attributed to other local strikes in which the strikers' receipt of benefits from the strike fund was not shown by the record. The referee found that no disqualificaiton applied in these instances and General Motors did not appeal from those adverse rulings.

with the referee that the emergency dues could not properly be described as "regular union dues". Like the referee, the appeal board treated the parenthetical language — "(in amounts and for purposes established prior to the inception of such labor dispute)" — as an explanation of the word "regular". The board focused upon the meaning of that language and the associated question when "such labor dispute" has its inception, and, rather than explicating the concept of "financing", assumed that the emergency dues payments disqualified plaintiffs unless the stated exception applied. Declaring that the inception of the labor dispute had preceded the adoption of the increased strike fund dues, the board upheld the referee's decision disqualifying plaintiffs.

On appeal to circuit court, the board's decision was affirmed by the Ingham Circuit Court and reversed by the Genesee and Wayne Circuit Courts.

The Court of Appeals, construing the subparagraph 29(8)(a)(II) exclusion of "regular union dues" from the definition of financing as evidence of a legislative intent to treat non-regular or extraordinary union dues as financing a labor dispute if used to support a strike, held that the increased strike fund dues paid during October and November, 1967 were not "regular" as that term is ordinarily understood. Finding that the referee and the appeal board had correctly determined that claimants were disqualified for financing the labor dispute which caused their unemployment, the Court of Appeals affirmed the Ingham Circuit Court and reversed the Genesee and Wayne Circuit Courts. Having concluded that the emergency dues were extraordinary rather than regular, the Court of Appeals found it unnecessary to explore the parenthetical language or to decide when the labor dispute cuasing plaintiffs' unemployment had its inception.[7]

We granted leave to appeal, limited to the following issues:

[7]*Baker* v *General Motors Corp*, 74 Mich App 237; 254 NW2d 45 (1977).

"(1) Did payment of the dues in question constitute financing of the labor dispute as a matter of law;

"(2) Was plaintiffs' unemployment caused by a labor dispute in active progress?" 402 Mich 828 (1977).

II

Every state's unemployment compensation statute includes some provision disqualifying from benefits an individual whose unemployment results from a labor dispute.[8] Most provisions are patterned after the corresponding section of the draft bills published by the Social Security Board[9] following passage of the Social Security Act of 1935,[10] which provided federal funding for state unemployment insurance programs.[11] The concept of labor dispute disqualification and the various statutes embodying it have engendered substantial litigation[12] and commentary.[13]

The Michigan statute declares the basic condition of labor dispute disqualification in its introductory sentence:

"An individual shall be disqualified for benefits for

---

[8]Anno: *General Principles Pertaining to Statutory Disqualification for Unemployment Compensation Benefits Because of Strike or Labor Dispute,* 63 ALR3d 88, 96; Lewis, *The "Stoppage of Work" Concept in Labor Dispute Disqualification Jurisprudence,* 45 J Urban L 319, 320 (1967).

[9]Lewis, fn 8 *supra,* p 322, fn 14, cites Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types (1936).

[10]49 Stat 620; 42 USC 301 *et seq.*

[11]Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification,* 17 U Chi L Rev 294 (1950); Lewis, fn 8 *supra,* pp 320-322.

[12]See, generally, Anno, fn 8 *supra.*

[13]In addition to the articles by Lewis (see fn 8, *supra*) and Shadur (see fn 11, *supra*), see Fierst & Spector, *Unemployment Compensation in Labor Disputes,* 49 Yale L J 461 (1940); Lesser, *Labor Disputes and Unemployment Compensation,* 55 Yale L J 167 (1945); Williams, *The Labor Dispute Disqualification—A Primer and Some Problems,* 8 Vand L Rev 338 (1955); Note, *Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed Because of Labor Disputes,* 49 Colum L Rev 550 (1949).

any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit."[14]

But under our statute, as under most statutes, determining whether a claimant's unemployment falls within the terms fo the basic disqualification is the beginning, not the end, of the inquiry.[15] The seemingly categorical disqualification principle of the first sentence is tempered by the language that follows it:

"No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute."

The statute requires that "direct involvement" be shown by establishing one of four enumerated circumstances. This case concerns but one aspect of the second of the listed alternatives:

"II. He is participating in or *financing* or directly interested in *the labor dispute which causes his total or partial unemployment.* The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph * * *."[16] (Emphasis supplied.)

---

[14]1967 PA 254.

[15]Shadur, *Supra,* pp 324-325; Note, fn 13 *supra,* p 558.

[16]In addition to the activities listed in subparagraph 29(8)(a)(II), the following conduct establishes direct involvement under paragraph 29(8)(a):

"1. At the time or in the course of a labor dispute in the establishment in which he was then employed, he shall *in concert with 1 or more other*

III

Because the basic disqualification provision of subsection 29(8) applies only if the claimant's unemployment is "due to a labor dispute in active progress" in the establishment where he is or was last employed, or in a functionally integrated establishment operated within the United States by the same employing unit, the threshold consideration is whether the facts of this case evidence the requisite causal link between plaintiffs' unemployment and a dispute in active progress.[17] Absent that causal connection, plaintiffs are not disqualified.

The Court of Appeals regarded the appeal board's finding that plaintiffs' unemployment was due to a labor dispute in active progress at a functionally integrated plant as conclusive because supported by competent, material and substantial evidence on the whole record.[18] We agree with the Court of Appeals assessment of the evidence but find its conclusion only partially responsive to plaintiffs' arguments. We understand plaintiffs to assert not only that the appeal board erred in finding a causal connection in fact, but also that the board

---

employees have voluntarily stopped working other than at the direction of his employing unit, or

* * *

"III. At any time, there being no labor dispute in the establishment or department in which he was employed, he shall have *voluntarily stopped working,* other than at the direction of his employing unit, *in sympathy with employees in some other establishment or department* in which a labor dispute was then in progress, or

"IV. His total or partial unemployment is due to a labor dispute which was or is in progress in any department or unit or group of workers *in the same establishment.*" 1967 PA 254 (emphasis supplied).

[17] "[T]he basic disqualification finding required in the first sentence * * * must be legally made before the proviso relating to 'direct involvement' becomes effective, and before considering or applying the tests of direct involvement * * *." *Park v. Employment Security Comm,* 355 Mich 103, 131; 94 NW2d 407 (1959).

[18] *Baker v General Motors Corp, supra,* 74 Mich App 245, fn 3. See Const 1963, art 6, § 28; MCL 421.38(1); MSA 17.540(1).

and all courts except the Wayne Circuit Court[19] misunderstood the legal standard of causation required by this subsection.

Plaintiffs argue that a claimant may be disqualified under subsection 29(8) only if a labor dispute in active progress is the sole cause of the claimant's unemployment. They assert that their unemployment was due not only to the labor disputes in progress at the functionally integrated foundries and plants, but also to the seniority provisions of the national and local agreements, which marked them as the first to be laid off, and to a combination of GM business decisions, particularly the choice not to replace materials supplied by the struck establishments through purchases in the open market. Plaintiffs urge us to conclude that the causal connection required to support the threshold finding of disqualification has therefore not been established.

We disagree. An individual is disqualified for benefits under the basic provision if a disqualifying labor dispute is shown to be a substantial contributing cause to his or her unemployment. The dispute need not be the sole cause of the unemployment.

The decisions of this Court relied on by the plaintiffs establish only that disqualification is inappropriate where other circumstances unrelated to the labor dispute would themselves have been sufficient to cause the unemployment for which

---

[19] The opinion of he Wayne Circuit Court stated in part:

" Another factor in the layoffs were *[sic]* the economic situations GM chose to become involved with in the various plants. Much of the business at the Wayne County plants was dependent upon parts supplied from other, then struck, plants. GM could have purchased the necessary parts on the open market, but chose not to do so.

"In order to uphold the finding from below, it must appear that the strike alone was the reason for the claimants' unemployment and such was not the case. It is the opinion of this court that the claimants herein are entitled to unemployment compensation for the two periods during which they were unemployed in early 1968."

Although plaintiffs advanced the identical argument in the other circuit courts, in the Court of Appeals, and before the appeal board, none of those tribunals specifically addressed it.

benefits are claimed.[20] The Legislature did not intend to withhold benefits from individuals who would have been unemployed even if an apparently related labor dispute had not

[20]In *Abbott v Unemployment Compensation Comm,* 323 Mich 32, 47; 34 NW2d 542 (1948), the claimants were temporarily laid off during reconversion of the plant where they were employed from wartime to peacetime production. A strike halted reconversion operations on September 8, 1945. The appeal board found as a fact that "the employer's reconversion program had progressed to the point that as of September 29, 1945, all of the employees involved herein would have been recalled to work *were it not for the strike then in existence".* (Emphasis supplied.) This Court upheld the board's determination that the labor dispute disqualification barred claimants from receiving unemployment benefits from September 29, 1945 through the date the strike was settled.

In *Clapp v Unemployment Compensation Comm,* 325 Mich 212; 38 NW2d 325 (1949), the claimants were laid off on November 14, 1945 when General Motors shut down its main Buick production line and an associated Fisher Body plant because it was unable to obtain frames from its supplier. On November 21, 1945, before the shortage of frames was remedied, the UAW called a strike at all GM plants; the strike lasted until March 13, 1946. The supplier resumed production of Buick frames in December. GM claimed that it would have recommenced Buick production on December 18, 1945 were it not for the then existing labor dispute and that the claimants were disqualified from and after that date. Payment of benefits for the period during which production was precluded by the frame shortage was not questioned, and this Court did not pass upon the issue. *Id.,* p 219. In affirming the appeal board's determination that the labor dispute disqualification applied from December 18, 1945 onward, the Court noted that there was sufficient evidence "to warrant the finding that all the plaintiffs would have been called back upon resumption of activities on December 18, 1945, *had there been no strike". Id.,* p 226 (emphasis supplied).

In *Scott v Budd Co,* 380 Mich 29, 37; 155 NW2d 161 (1968), 44 of the 45 claimants were laid off when the employer reduced operations in its hub and drum machining section because a walkout in the foundry section of the same establishment had reduced the supply of brake drums available for machining; those employees fell within the labor dispute disqualifiation. One claimant employed in a different section was held not disqualified:

> "His unquestioned testimony is that he was bumped by someone exercising greater seniority rights, but there is nothing to link the bumping with an employee who exercised such right to bump due to the shutdown operations in the brake drum section. No causal connection between a labor dispute in active progress or between the shutdown or start-up operations caused by such labor dispute, as to claimant Knapp, was established."

The opinion thus intimates that if Knapp's displacement by a fellow employee with greater seniority rights had been occasioned by the dispute-caused shutdown that idled the other claimants, Knapp would also have been disqualified.

To the same effect, see *Unemployment Compensation Comm of Alaska v Aragon,* 329 US 143, 151-152; 67 S Ct 245; 91 L Ed 136 (1946), where the United States Supreme Court concluded that the employees of two salmon canneries that failed to operate during the 1940 season "only because of their inability to negotiate satisfactory labor agreements" were properly disqualified, but that the employees of another canner whose cancellation of its season "was caused primarily by factors other than the company's inability to negotiate a satisfactory labor contract" were not disqualified.

occurred. Those decisions all support the conclusion that the Legislature intended the basic disqualification provision to apply when a claimant's unemployment was caused by a labor dispute and no independent and sufficient cause for the unemployment could be shown.[21]

The seniority provisions and management decisions which plaintiffs identify as contributing causes of their unemployment would not themselves have caused plaintiffs' unemployment or any unemployment were it not for the labor disputes in active progress at the functionally integrated foundries. But for those disputes, materials would have been available at plaintiffs' places of employment, the work force at those establishment would not have been reduced, and the seniority provisions would not have become operative. The labor disputes in active progress at the foundries were shown by competent, material and substantial evidence to have been substantial contributing causes of the layoffs which idled plaintiffs. We affirm the board's finding that plaintiffs' unemployment was "due to a labor dispute in active progress" within the meaning of subsection 29(8).

IV

Once it has been determined that the basic disqualification provision applies, the inquiry progresses to whether the claimant is directly involved in the labor dispute which caused his or her unemployment. In this case, plaintiffs' emergency dues payments to the strike fund are alleged to constitute "financ-

ing" of the local disputes at the foundries — a disqualifying direct involvement under subparagraph 29(8)(a)(II). That subparagraph, however, also declares that certain kinds of union dues payments may not be construed as "financing a labor dispute". Since plaintiffs would escape disqualification if their emergency dues payments fall within the protective provision, we consider whether those payments are specifically exempted from treatment as "financing" before attempting to determine whether they may be affirmatively classified under that heading.

Subparagraph 29(8)(a)(II) states that the "payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute * * *". Except for the parenthetical language, which was added in 1963,[22] this proviso has been part of Michigan's unemployment compensation act since 1937.[23]

The referee and the appeal board both treated the parenthetical language as a limitation that would preclude labeling certain payments "regular" union dues and concluded that the payments in question did not satisfy the parenthetical condition. The Court of Appeals reasoned that the express exclusion of "regular union dues" from the category of "financing" evidence a legislative intent to leave every other type of union assessment used to support a labor dispute within the terms of the subsection 29(8) disqualification, and that the language added in 1963 only qualified the "regular union dues" exception further. Employing the word "regular" as the first branch of a

[21] *Abbott* and *Clapp* arose under an earlier version of the basic disqualification provision, which disqualified a claimant if his unemployment resulted from "a stoppage of work existing because of a labor dispute in the establishment in which he is or was last employed". Although this Court's decision "construing prior language are not applicable except insofar as they may afford guidance", *Scott v Budd Co, supra,* p 36, *Scott* appears to have approached the causation question in the same manner as *Abbott* and *Clapp.*

[22] 1963 PA 226.

[23] 1937 PA 347.

two-pronged test completed by the parenthetical language, the Court of Appeals declared that " 'regular' is synonymous with 'normal', 'typical' and 'natural' to the extent that they all mean 'being of the sort or kind that is expected as usual, ordinary or average' ", and concluded that the increased dues paid pursuant to the October, 1967 constitutional amendment did not meet that description.

Plaintiffs attack the Court of Appeals reliance upon everyday meanings of the word "regular" and urge us to construe the term "regular union dues" as the equivalent of "periodic dues" under § 8(a)(3) of the National Labor Relations Act,[24] a term which they assert means "those uniformly levied union dues which are enforceable through a union security clause and which may be required of union members as a condition of continued employment".[25] In plaintiffs' view, it is immaterial whether the amount of the dues is temporary or permanent, fixed or variable, so long as they are part of the union's constitutionally adopted dues structure rather than separately imposed special assessments. Plaintiffs contend, alternatively, that the Legislature intended the parenthetical language added in 1963 to explain the meaning of "regular union dues".

The parties direct us to no legislative history which would aid us in reaching a more precise understanding of the meaning of "regular union dues" or the relationship between that phrase and the parenthetical language added in 1963. Mindful

[24] 29 USC 158(a)(3).

[25] Appellants' brief, p 16.

Only the collection of "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership", as opposed to fines, special assessments or other penalties, may be enforced through a union security clause under § 8(a)(3). See *National Labor Relations Board v Spector Freight System, Inc,* 273 F2d 272, 275-276 (CA 8, 1960), *cert den* 362 US 962; 80 S Ct 879; 4 L Ed 2d 877 (1960). The emergency dues which gave rise to this case were ruled to be "a permissible change in 'periodic dues' within the meaning of the Section 8(a)(3) proviso" by the NLRB Regional Director for Region 31 and the NLRB General Counsel.

of the remedial purpose of the Michigan Employment Security Act to provide relief from the hardship caused by involuntary unemployment,[26] we seek a liberal construction that will effectuate that legislative purpose,[27] yet be consonant with reason and good discretion.[28]

We conclude, as did the Court of Appeals, that the parenthetical language states a separate test that union dues must meet in order to be exempted as a matter of law from possible classification as financing a labor dispute. In order to be exempt under all circumstances, union dues must be both (1) regular and (2) in amounts and for purposes established prior to the inception of the labor dispute that caused the claimant's unemployment. We further agree with the Court of Appeals that the temporary emergency dues paid in October and November, 1967 were not "regular" union dues.

Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible.[29] Before the 1963 amendment, the word "regular" described a type of union dues, payment of which would not expose a union member to potential disqualification for financing however the dues payments were used. Had the Legislature intended the parenthetical phrase added in 1963 to be a complete definition of "regular", it should have made that intention clear or supplanted the word "regular" altogether.[30] It did not. We conclude that the word retains independent significance as a limitation upon the types of union dues

[26]MCL 421.2; MSA 17.502.

[27]*Noblit v The Marmon Group,* 386 Mich 652, 654; 194 NW2d 324 (1972).

[28]*Collins v Secretary of State,* 384 Mich 656, 666; 187 NW2d 423 (1971).

[29]*Stowers v Wolodzko,* 386 Mich 119, 133; 191 NW2d 355 (1971); *Scott v Budd Co, supra,* p 37.

[30]If the Legislature so intended, it could have said:

"The payment of union dues in amounts and for purposes established prior to the inception of such labor dispute * * *."

automatically exempted from potential classification as financing.

The words of the Employment Security Act, like other statutes, are to be given their plain and ordinary meaning absent some indication that the Legislature intended otherwise.[31] We perceive no evidence of a legislative intention to equate "regular union dues" with "periodic dues" enforceable through a union security agreement under § 8(a)(3) of the NLRA. The federal statute's reference to "periodic dues" was not inserted until ten years after the "regular union dues" proviso was added to the Michigan Employment Security Act.[32] We conclude that the Legislature chose the term "regular" to exclude from possible treatment as financing those dues payments required uniformly of union members and collected on a continuing basis without fluctuations prompted by the exigencies of a particular labor dispute or disputes.[33] Such a construction is consistent with ordinary usage and the common understanding of the word and serves to distinguish between sums customarily and continually collected and unusual collections for the purpose of supporting a labor dispute.

In *Burrell v Ford Motor Co,*[34] this Court approved the appeal board's determination that UAW members had not financed local labor disputes which caused their unemployment merely because a portion of their monthly membership dues had been allocated to a union strike insurance fund from which pay-

[31]*Bingham v American Screw Products Co,* 398 Mich 546, 563; 248 NW2d 537 (1976).

[32]Pub L No 101, 80th Cong, 1st Sess (1947); 61 Stat 136 (Labor Management Relations Act). See Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining (St. Paul: West Pub Co, 1976), p 640.

[33]The parenthetical language added in 1963 reflects much the same concern — to identify dues increased or imposed in connection with an ongoing labor dispute — but, rather than subsuming the distinction between regular and extraordinary dues, extends disqualification to some payments which otherwise would be non-disqualifying regular dues.

[34]*Burrell v Ford Motor Co,* 386 Mich 486, 494-495; 192 NW2d 207 (1971).

ments were disbursed to strikers involved in the unemployment-producing local disputes. The appeal board had stated:

> "We believe that any differentiation between administrative dues and Strike Insurance Fund dues is merely an internal designation by the union and still establishes that the regular union dues are established to be $5 monthly under Article 16, Section 2 * * *."

The record in *Burrell* disclosed that each UAW member's $5 monthly dues consisted of $3.75 in administrative dues ($1.75 of which was forwarded to the international union) and $1.25 for the union's strike insurance fund.[35] There was no indication that the dues had been increased at any time relevant to the labor dispute in question. Monthly dues continued to be $5 per member until the union constitution was amended on October 8, 1967.[36]

We are persuaded that the October and November, 1967 strike fund dues are not comparable to the strike fund portion of the pre-amendment monthly dues. The text of the amendment shows that each member's strike fund dues were increased from $1.25 per month to $11.25 or $21.25 per month[37] for the duration of the then existing collective bargaining emergency and perhaps until the fund contained 25 million dollars. It was not contemplated that the increased amounts would be collected indefinitely; following the emergency, dues would be set at "two hours straight time pay per month". The emergency dues provided by the amendment constituted a marked deviation from the regular pattern of dues collection; they were a temporary emergency measure whose obvious purpose was to replenish the union strike fund. The Court of Appeals correctly concluded that these payments could not properly be termed "regular".

[35]Michigan Supreme Court Records and Briefs (31 October Term, 1971), Joint Appendix, p 309a.

[36]Appeal board decision in this case.

[37]The increased amounts were, respectively, 9 and 17 times the preceding strike fund dues. Overall, each member's monthly dues were either tripled or quintupled.

V

Because the emergency dues payments were not "regular union dues", we need not decide whether they were "in amounts and for purposes established prior to the inception of [the] labor dispute". We turn to the question whether payment of the emergency dues constituted "financing" of the local labor disputes which caused plaintiffs' unemployment.

While the statute does not require that payments made by individuals whose disqualification is in issue be traced into the hands of workers involved in the labor dispute which caused the individuals' unemployment, the term "financing" suggests a meaningful connection between the payment or class of payments said to constitute financing and the labor dispute allegedly financed. The appeal board did not give separate consideration to the meaning of "financing", in general or as applied to this case. We therefore remand this matter to its successor, the tribunal with the most experience and expertise in the application of the act, to reconsider, in light of its own unique familiarity with the act, practical considerations and related issues implicated by this question, whether plaintiffs' emergency dues payments were sufficiently connected with the local labor disputes which caused their unemployment to constitute "financing" of those labor disputes. The parties shall be provided an opportunity to present additional evidence, arguments and briefs.

VI

After this case was argued, this Court granted plaintiffs permission to file supplemental briefs limited to two issues said to "necessarily result from the United States Supreme Court's recent decision in *New York Telephone Co v New York State Dep't of Labor,* 440 US 519; 99 S Ct 1328; 59 L Ed 2d 553 (1979):

> "I. Is the financing proviso of § 29(8)(a)(II) of the

MESA, as interpreted by the Court of Appeals, preempted by the National Labor Relations Act (NLRA)?

"II. Alternatively, can and should the financing proviso of § 29(8)(a)(II) be narrowly construed to apply only to direct payments to strikers by those sought to be disqualified thereunder and/or direct payments from a fund specially earmarked for such strikers, as opposed to a nationally established, general and regular strike insurance fund?"

Plaintiffs argue that, if the financing provision of the labor dispute disqualification is construed to disqualify them for the payment of dues required to maintain their union membership, that provision is preempted by federal labor law on two grounds: (1) it penalizes plaintiffs for maintaining membership in and providing financial support to their union, an activity expressly protected under § 7 of the NLRA; (2) under such an analysis, the state burdens and interferes with internal union decisions regarding allocation of dues and the amount and timing of dues increases, matters which Congress intended to leave free from both state and federal regulation.

So far as this Court can determine, federal preemption issues were not raised before the referee or the appeal board, were fleetingly noted in the circuit courts, and were not extensively briefed in the Court of Appeals. Except for a terse conclusory statement by one circuit judge, none of those tribunals addressed these questions.

We are asked, after oral argument, to consider questions not yet decided by any court which have heretofore played a secondary role in the case and which lie in an area where the present direction of the United States Supreme Court is far from clear.[38]

[38]In the case cited in plaintiffs' request for leave to file supplemental briefs, *New York Telephone Co v New York State Dep't of Labor,* 440 US 519; 99 S Ct 1328; 59 L Ed 2d 553 (1979), there were three opinions for the result that prevailed, none of which gained more than three signatures, and one dissenting opinion.

It is unclear what types of cases, other than the few to reach the appellate courts, have presented "financing" issues in the past, and in which of those cases disqualification for financing a labor dispute has been enforced. Nor does it appear whether the financing provision has any practical significance outside of auto industry disputes between the UAW and the major automakers. We should also be better informed concerning the pragmatic consequences that might follow adoption of any possible definitions of "financing".

If plaintiffs did not engage in "financing" as a matter of state law, it may be unnecessary to decide in this case whether federal law preempts that provision of the state unemployment compensation act. And, even if plaintiffs are ultimately held to have financed the labor disputes which caused their unemployment, we are of the opinion that an asserted conflict between state and federal law should not be passed upon until the challenged state provision has been definitively construed. We therefore defer decision of the issues raised in plaintiffs' supplemental brief until after remand.

The briefs of the parties after remand shall include (1) all historical materials that might assist this Court in determining (a) the extent to which Congress intended that the amounts and purposes of union dues should be subject to or free from state regulation or inquiry and (b) the extent to which Congress intended that the states should be permitted to disqualify, or prohibited from disqualifying, claimants from unemployment compensation benefits for financing through union dues the labor disputes that caused their unemployment; (2) any further argument the parties desire to make on the federal preemption issue; and (3) argument on the First Amendment and Equal Protection challenges raised in plaintiffs' and *amicus curiae* United Steelworkers' supplemental briefs.[39]

[39]These issues, like those involving federal labor law preemption, were not extensively briefed or considered at prior stages of this litigation. In view of the protracted history of this case, we will, after remand, rule upon these issues as well in an effort to bring about a final resolution.

We remand to the board of review, the successor to the appeal board,[40] for further proceedings consistent with this opinion. We retain jurisdiction.

Coleman, C.J., and Williams, Fitzgerald, Ryan, and Blair Moody, Jr., JJ., concurred with Levin, Jr.

Kavanagh, J., did not participate in the decision of this case.

[40]1977 PA 52; MCL 421.35(3); MSA 17.537(3).

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claims of
A. G. BAKER, ET AL, Appeal Docket Nos.
Claimant B69-03117-40569 ET AL
GENERAL MOTORS CORPORATION,
Employer

[Issued June 10, 1982]

DECISION ON REMAND BY ORDER OF THE MICHIGAN SUPREME COURT

This matter is before the Board of Review pursuant to a remand order issued by the Michigan Supreme Court on October 16, 1980, *Baker* v *General Motors Corp*, 409 Mich 639, 297 NW 2d 387 (1980).

At the time of their application for benefits in 1968, the claimants were all members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and primarily production and maintenance workers for General Motors (GM) at various plants in Michigan. In the last few months of 1967, the claimants paid emergency dues into the UAW strike fund. In January, 1968, UAW authorized strikes took place at GM foundries in Saginaw, Michigan; Defiance, Ohio; and Tonawanda, New York. The foundry workers received UAW strike benefits. During the first two weeks of February, 1968, claimants filed for employment security benefits after being laid off by General Motors.

The Michigan Employment Security Act disqualifies a claimant from receiving unemployment benefits if "He is . . . financing . . . the labor dispute causing his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute . . . "MCLA 421.29(8)(a)(ii); MES 17.531(8)(a)(ii).

The Supreme Court has decided that the foundry strikes were "a substantial contributing cause" of the claimants' unemployment (409 Mich at 662) and that emergency dues were not regular dues (409 Mich at 649, 665-668). The fact that emergency dues were not regular dues did not automatically mean that emergency dues disqualify claimants for "financing" of the labor disputes (409 Mich at 650).

> *"While the statute does not require that payments made by individuals whose disqualification is in issue be traced into the hands of workers involved in the labor dispute which caused the individuals' unemployment, the term "financing" suggests a meaningful connection between the payment or class of payments said to constitute financing and the labor dispute allegedly financed.* The appeal board did not give separate consideration to the meaning of "financing", in general or as applied to this case. We therefore remand this matter to its successor, the tribunal with the most experienced and expertise in the application of the act, to reconsider, in light of its own unique familiarity with the act, practical considerations and related issues implicated by this question, whether plaintiffs' emergency dues payments were sufficiently connected with the local labor disputes which caused their unemployment to constitute "financing" of those labor disputes. The parties shall be provided an opportunity to present additional evidence, arguments and briefs." (*Baker*, 409 Mich at 668) (emphasis added).

Pursuant to the remand, hearings were held by the Board of Review on June 2, June 3, June 22, September 15, October 13 and December 8, 1981. Additional testimony and exhibits were presented, oral argumants were made and briefs were submitted.

I. FINDINGS OF FACT

On September 6, 1967 the national and local collective bargaining agreements between the UAW and the three major

American automakers — General Motors, Ford and Chrysler — expired. In August, 1967, UAW members who worked for GM had voted to authorize strikes, if necessary, on national and local issues (409 Mich at 651). Nevertheless, Ford was selected as the initial strike target during that bargaining season and a strike against Ford began on September 7, 1967.[1] In addition, a national strike against the Caterpillar Company commenced on October 2, 1967.[2] The national Ford strike ended on or about October 22, 1967[3] and the Caterpillar strike was settled on October 25, 1967.[4]

On October 8, 1967 a special UAW convention was called,[5] during the course of which Article 16 of the UAW Constitution was amended by an overwhelming vote (98%).[6] The amended portions of Article 16 read in relevant part as follows:

> "Article 16.
> "Section 2(a).
> "Emergency Dues.
> Secretary of the Local Union.
> "Commencing with the eighth (8th) day of October, 1967 until October 31, 1967, and for each month thereafter during the emergency as defined in the last paragraph of this subsection, Union administrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be as follows:
> "1. For those working in plants where the average

---

[1]UAW Sup. Ct. Appendix — 130a

[2]BR Ex. 11

[3]Certified record at 835, 836; Solidarity Dec., 1967 at 7 — BR Ex. 27. (Solidarity is the official publication of the UAW).

[4]BR Ex. 11

[5]The convention call went to all UAW locals. UAW "Proceedings" BR Ex. 22 at 6.

[6]UAW "Proceedings" BR Ex. 22 at 72

straight time earnings . . . is three dollars ($3.00) or more, *twenty-one dollars and twenty-five cents ($21.25) per month.*

"2. For those working in plants where the average straight time earnings . . . is less than three dollars ($3.00), *eleven dollars and twenty-five cents ($11.25).*

"This schedule of dues remain in effect during the current collective bargaining emergency as determined by the International Executive Board and thereafter, if necessary, until the International Union Strike Insurance Fund has reached the sum of twenty-five million dollars ($25,000,000), at which time the dues structure established in 2(b) below, shall become effective." (emphasis supplied).

Section 2(b) provided in part:

"All dues are payable during the current month to the Financial Secretary of the Local Union. Commencing with the month following the emergency as set out in Section 2(a) and for each month thereafter, minimum Union dues shall be a sum equivalent to two hours straight time pay per month . . .

"Dues income shall be distributed so that the Local Union shall receive forty (40) per cent, the International Union Strike Insurance Fund shall receive thirty (30) per cent and the General Administrative Fund of the International Union shall receive thirty (30) per cent." (Emphasis supplied).[7]

---

[7]409 Mich at 651, 652 n. 4, UAW Sup. Ct. Appendix — 61a.
During the same convention Section 10(a) of Article 16 was amended to provide as follows:

"Section 10(a) (New): During the emergency set out in Section 2(a), from each member's Union administrative dues, each local Union must remit a monthly per capita tax of one dollar and seventy-five cents ($1.75) and the Local Union shall retain two dollars ($2.00).
In each month, each Local Union must remit the full amount of Union Strike Insurance Fund dues to the International Union, such dues to be placed in the International Union's Strike Insurance Fund. The member's monthly per capita tax and Strike Insurance Fund dues shall be forwarded to the International Secretary-Treasurer.
One dollar ($1.00) of each reinstatement fee shall be forwarded to the International Secretary-Treasurer." UAW "Proceedings" BR Ex. 22 at 43,73.

Prior to the amendment minimum monthly dues were $5.00, consisting of administrative dues of $3.75 and Strike Fund Insurance dues of $1.25.[8]

It is the contention of the UAW — according to the testimony of Mr. Jerry Wilse, Director UAW Strike Ins. Dept., given on June 2 and 3, 1981 — that the "convention was called specifically for this Ford strike" (T. 6/3/81 at 24) and "that convention was called because negotiations at Ford had reached a stalemate, and we had no idea where we were going." (T. 6/2/81 at 25). However, we note Mr. Wilse's answer to the question: "Did the dues increase turn out to be needed for the Ford strikes?" His answer was: "No, it didn't. It was shortly after the special convention that before the actual dues even began to be collected that Ford strike was settled." (T. 6/2/81 at 25).

The stated purpose of the convention, as contained in the official published "UAW Proceedings", was as follows:

"The Special Convention is being held to:

1. Review the status of our 1967 collective bargaining effort.

2. To consider revision of the dues program of the International Union, UAW, to provide adequate Strike Funds to meet the challenges of the 1967 and 1968 collective bargaining effort.

3. To consider revisions of the Constitution of the International Union as it relates to the payment of dues, Strike Fund, membership eligibility, Strike Insurance Program and other matters related to emergencies facing

---

[8]UAW Sup. Ct. Appendix — 37a.

the International Union, UAW."[9]

At the convention a background statement was offered by the UAW Constitution Committee which said in part:

> "To support the Ford and Caterpillar workers in their strike and to assure strike benefits to members who may be involved in other strikes in the course of the critical weeks and months ahead, a temporary emergency dues increase is needed, the total increase going into the International Strike Fund to be used exclusively to support workers and their families when they are forced to strike to achieve their just demands."[10]

Later, Mr. Mazey presented additional comments on the

---

[9]UAW "Proceedings" BR Ex. 22 at 7; also see Solidarity Oct., 1967 at 5 —BR Ex. 25; Solidarity Nov., 1967 at 8 — BR Ex. 26, 1967 Ex. 184 at 3762 of Certified record. Prior to the convention statements by various UAW officials were reported in the Detroit newspapers:

> "The Union will hold a special convention at Cobo Hall October 8 at which time delegates will be asked to approve a special dues assesment of of about $20 a month. The money would be used to bolster the union's $67 million strike fund. *UAW President Walter P. Reuther has said that he wanted to be able to make demands on GM with the backing of a $100 million fund."* (Emphasis added). (Detroit News Sept. 10, 1967 at 3a — BR Ex. 31g)

Similarly, on October 8, 1967 the Detroit News reported a convention-eve statement by Emil Mazey, UAW Secretary-Treasurer, in which he made an "educated guess" that the Ford strike would be concluded in two weeks. Detroit News Oct. 8, 1967 (BR Ex. 31j). The same article reported:

> "Reuther told delegates to the union's national GM Council, at the time Ford was chosen as a target company, that *he wanted to be able to face GM with a $100 million strike fund after the Ford settlement."* (Emphasis added).

These newspaper accounts were submitted by the parties at the request of the Board. We do not refer to them in the belief they necessarily represent the actual statements made by the UAW officials, but that they indicate what appeared in the public media and may have been seen by the claimants. See *Keith* v *Chrysler,* 390 Mich 458 (1973) Williams J. opinion at 493; *Burrell* v *Ford Motor Co.,* 386 Mich 486 at 498 (1971). However, for the proposition that union officials may, as agents, speak for or otherwise bind their membership see *Applegate* v *Palladium Pub. Co.,* 95 Mich App 299 (1980); *Jozwik* v *ESC,* 30 Mich App 506 (1971); *Vickers* v *ESC,* 30 Mich App 530 (1971); Mich R Evid. 801(d)(2)(D).

[10]UAW "Proceedings" BR Ex 22 at 38.

strike assistance situation. In part he stated:

> "In the event we have a strike at General Motors — and my educated guess is that unless General Motors Corporation begins to bargain intelligently and unless the GM Corporation begins to improve the grievance procedure and representation system in the GM contract, we are going to have a strike in that Corporation — I am sure that nobody would want Vice President Leonard Woodcock and the Bargaining Committee to go to the bargaining table at General Motors with our strike fund depleted."[11]

Shortly after the special convention, the UAW publication "Solidarity", responded to the question: "Why was the increase necessary?":

> "A. It's crucially important that enough money is in the strike insurance fund to meet the needs of workers on strike at Ford and to meet the challenges of the corporations to workers at General Motors, Chrysler, the farm implement plants, the parts plants and other in the U.S. and Canada.
>
> Next year, moreover, most aerospace workers will be faced with major contract bargaining."[12]

On October 13, 1967, Mr. Leonard Woodcock, then UAW Vice President and Director of the General Motors Department, issued a letter addressed "TO ALL UAW MEMBERS IN GENERAL MOTORS PLANTS AND WAREHOUSES, USA."[13] In that letter, he referred to "the increased dues needed to sustain the Ford strike and keep ready for GM". Later, he continued:

> "Every penny of this increase will go into the strike fund to help pay strike assistance benefits to Ford and

---

[11]UAW "Proceedings" BR Ex 22 at 47.

[12]Solidarity Nov., 1967 at 8 — BR Ex. 26

[13]1967 Ex. 90.

Caterpillar Tractor strikers and other UAW members currently on strike. It is also needed to replenish the fund so that our bargaining teams at General Motors and Chrysler — and other plants — can bargain with the assurance that strike assistance benefits will be available should those workers have to hit the bricks later on."

And still later in the same letter:

"These emergency extra dues are being raised to protect GM workers as well as support the Ford strikers. When our time comes at GM, we cannot go back to the bargaining table without an adequate strike fund behind us and promise of continued assistance from other UAW members."

It must be noted that during the preceding round of negotiations in 1964, local labor disputes at General Motors caused shutdowns in related plants which were very costly not only to the employer but also to the UAW Strike Fund.[14] For instance, see Mr. Woodcock's letter of October 13, 1967 in which he stated:

"In 1964, you will recall, we had a 10-day strike at GM on national issues, followed by many local strikes, some lasting as long as six weeks. This resulted in a strike fund expenditure of $37,383,698.08" [15]

[14] T. 6/22/81 at 19, 28. In fact, local disputes resulting in strikes against GM had occurred in every contract period beginning with 1958. T. 6/22/81 at 18, 24.

[15] 1967 Ex. 90.

The 1967 situation was compared to the 1964 experience in a Detroit News article which appeared on October 7, 1967 and was entitled "UAW Calls on Its Forces to Replenish Strike Funds" (BR Ex. 31i). In part of that article, the bargaining situation at GM was described:

"Of some 31,100 issues on the plant level, about 23,000 remain unresolved. An estimated 3,200 with withdrawn by the union and 4,800 have been settled.

In contract talks in 1964 at this same stage, there were 17,600 local issues unresolved after a national agreement was reached on Oct. 5. The company was hit by a 35-day strike until the local disputes were ironed out."

Similarly, see Detroit News Sept. 2, 1967 (BR Ex. 31e).

In addition Mr. Mazey stated at the special convention," so that a GM strike would cost over $12,000,000 a week, or based on four and a third weeks a month, over $50,000,000 a month." [16]

After the emergency dues amendments were approved by the special convention, the dues were collected for the months of October and November, 1967. As a result of the refusal by General Motors and Chrysler to extend their UAW contracts beyond the expiration date of September 6, 1967, collection of union dues by the automatic checkoff method from GM and Chrysler workers did not occur.[17] Instead, dues were collected "voluntarily" from those workers by UAW stewards "by hand".[18]

The UAW tightened its administrative rules to encourage payment.[19] When some convention delegates objected to the stricter provisions, Mr. Reuther responded: "We know we are in an emergency. If we give a fellow other than the normal time then the result will be that *we won't be collecting the money fast enough if we have to move into a General Motors Strike.*" [20] (emphasis added)

Nevertheless, despite the absence of any enforceable union security clause, the UAW stipulated that all of the claimants paid the emergency dues.[21] There is nothing in the record to indicate that any claimants were subject to discharge from employment or ouster from the union for failure to pay dues. The record establishes that a UAW member's entitlement to strike benefits was dependent on his or her being in good standing and not in arrears in dues.[22]

[16] UAW "Proceedings" BR Ex. 22 at 49.

[17] Detroit News Sept. 28, 1967 BR Ex. 31[h]; Detroit Free Press Oct. 9, 1967 BR Ex. 31[1]: T. 12/8/81 at 86, 91-95; Certified record at 805.

[18] UAW "Proceedings" BR Ex. 22 at 50, 62; BR Ex. 31[1].

[19] UAW "Proceedings" BR Ex. 22 at 61,62,73,74; BR Ex. 31[1]; 1967 Ex. 90.

[20] UAW "Proceedings" BR Ex. 22 at 75, also BR Ex. 31[m].

[21] 409 Mich at 652; Certified record at 3748-3750; 1967 Ex. 189; T. 6/3/81 at 8.

[22] BR Ex. 17 — 1967 UAW Strike Assistance Program at 1,2; BR Ex. 22 at 50; 1967 Exs. 54A, 61D, 78,90; T. 6/2/81 at 30.

For the two months the emergency dues were in effect, each claimant, depending on the average straight time earnings in his or her plant, paid a total of $20.00 or $40.00 of Emergency Dues (409 Mich at 652). It was agreed by the parties that none of the striking foundry workers received informal donations (such as plant-gate barrel collections) from the claimants' local unions.[23]

We here insert facts as found by the Michigan Supreme Court.

> "On November 30, 1967, the UAW determined that there would be no nationwide strike at GM plants during December, 1967 and waived collection of the emergency dues during December, 1967 and January, 1968. However, the letter informing GM of the waiver noted that 'the collective bargaining emergency is not yet ended.'"[24]

The letter referred to by the Supreme Court reads in pertinent part as follows:

> "We would like to advise you that the International Executive Board, at a meeting held November 30, 1967, determined that there would not be a strike at General Motors Corporation plants in the United States and Canada at least during the month of December, 1967, that the collective bargaining emergency could be determined to be in suspension and, therefore, the emergency dues would be waived for the month of December, 1967, and the month of January, 1968.
>
> *"Since, obviously, the collective bargaining emergency is not yet ended, the dues program is reverting to the basic five dollars ($5.00) per month in effect prior to the October 8, 1967, Convention, and not going to the permanent dues program of two hours' pay per month."* (Emphasis supplied).[25]

[23] T. 6/2/81 at 33-36,80; T. 9/16/81 at 9, 10.

[24] 409 Mich at 653.

The Michigan Supreme Court further found as follows:

> "The UAW and GM reached agreement on all national issues by December 15, 1967. Following ratification by the membership, the new national agreement took effect on January 1, 1968. However, local bargaining issues at a number of plants remained unresolved.
>
> "During January, 1968, GM foundries at Saginaw, Michigan; Defiance, Ohio; and Tonawanda, New York, were each shut down for approximately 10 days because of strikes called by the UAW over local issues. It is stipulated that the striking UAW members at these establishments received strike benefits from the strike fund in which the emergency dues collected in October and November were deposited. The local strikes at the foundries were followed by shutdowns or cutbacks in production at 24 other GM plants in Michigan and over 19,000 workers, including the plaintiffs, were laid off from their employment in the affected plants."[26]

The strike at the Chevrolet Grey Iron Foundry, involving UAW Local 668, lasted 11 days — from January 17 to January 27, 1968.[27] Strike fund benefits of $8,985.31 were paid to the Local from the UAW Strike Fund.[28]

[25] 409 Mich at 653, n. 5. The emergency officially ended and the 2 hours pay per month dues program was implemented in March, 1968 (T. 6/2/81 at 43-44,51).

[26] 409 Mich at 653.

[27] BR Ex. 2, but see slightly different dates in BR Ex. 18.

[28] BR Ex. 2; BR Ex. 21 attachment C. We note the eight day delay between the inception of the strike and the beginning of entitlement to strike benefits (BR Ex. 17 at 3 par. 23, also discussed *infra* at 9) partly explains the relatively small amounts of strike benefits, especially for Local #668, paid to the foundry workers as a result of their 11 or 12 day strikes. T 6/22/82 at 68.

An eleven day strike also occurred at the Central Foundry in Defiance, Ohio, idling Local 211 from January 16 to January 26, 1968. Strike Fund benefits paid totaled $122,265.[29]

The Tonawanda, New York dispute involved Local 1173 which struck two facilities — Chevrolet Tonawanda Foundry and Chevrolet Metal Casting. The strike lasted for 12 days — January 19 to January 30, 1968 and a total of $115,995 in strike benefits were paid.[30]

On October 13, 1981, counsel for General Motors and the claimants agreed to a stipulation, which in part detailed how the mechanism of strike benefit payments operated. That stipulation reads in relevant part:

> ". . . 2. Generally speaking, on the 7th or 8th day after a strike begins, a request is sent to the secretary-treasurer of the UAW by the Strike Insurance Department asking that the secretary-treasurer issue a check to the striking local union for estimated strike benefits. The amount requested was based on an estimate that the strike would last two weeks.
>
> 3. Where the strike actually ended on the 7th day (although this information may not have been known to the Strike Insurance Department when it requested a check), the local union, that was not entitled to any strike assistance, generally returned the checks sent to it.
>
> 4. Where strikes lasted less than 15 days, such as the three striking foundries (locals 211, 668 and 1173), the Local Union reimbursed the International Union in the amount of the surplus monies received from the International Union in the amount of the surplus monies

[29] BR Ex. 2, BR Ex. 21 attachment C.

[30] BR Ex. 2; BR. Ex. 21 attachment C. The UAW has been unable to provide a further breakdown of the benefits paid to the Foundry and Metal Casting workers.

> received from the International Union over the amounts actually sent for strike related activity. For example, the International Union Strike Insurance Department advanced $180,000 to Local Union 211 in two payments of $90,000 each. $60,000 was returned to the International Union. Local 211 strike expenditures totaled approximately $120,000. That was later adjusted to $122,000.
>
> 5. Strike benefits are not paid by Local Unions until the 15th day of the strike. However, if a strike ended between the 8th day (when strike benefits begin to accrue) and the 15th day, some Local Unions often paid strike benefits beginning on the day after the strike actually ended. For example, if a strike ended on the 11th day after it began, strike benefits would usually be paid by that Local Union anywhere from the 12th day to what would have been the 15th day, had the strike lasted that long. Each striking member would receive a pro-rated amount of the strike benefit."[31]

Nevertheless, it was established by the April 30, 1970 stipulation of the parties: "That the UAW members, in good standing, who were on strike at the Chevrolet Tonawanda, New York foundries; Chevrolet Saginaw, Michigan foundries and the Central Foundry at Defiance, Ohio during the period from Januray 17, 1968 through February 1, 1968 were paid and received strike benefits from the aforesaid "International Union's Strike Insurance Fund" in accordance with the provisions of said amended Constitution."[32]

More specifically, each striking foundry worker received 2 or 3 days of strike benefits amounting to $4.00 to $6.00 a day.[33]

Those same benefits came from the UAW International

[31] BR Ex. 21

[32] Certified record at 3748-3750; 1967 Ex. 189; T. 6/3/81 at 8,9.

[33] BR Ex. 17 at 3 paragraphs 23-25,27,28; BR Ex. 18; also see UAW Brief at 13,14 and n. 10 there.

Strike Fund, which in the preceding months had received a total of $42,000,000 of emergency dues.[34]

The record reveals the following about the state of the strike fund: For the first ten months of calendar 1967 the average monthly income was $2,070,504.[35] As of October 31, 1967, the balance of the fund was $41,685,651. Monthly beginning balances, income, disbursements and month-end balances are summarized in the following table:

TABLE I

	9/30/67 to 10/31/67	10/31/67 to 11/30/67	11/30/67 to 12/31/67	12/31/67 to 1/31/68	1/31/68 to 2/29/68
Beginning Balance:	$58,569,	$41,685,	$43,336,	$53,090,	$65,124,
Income:	$ 4,282,	$14,195,	$13,441,	$14,843,	$ 6,180,
Disbursements:	$21,166,	$12,544,	$ 3,686,	$ 2,809,	$ 5,049,
Ending Balance:	$41,685,	$43,336,	$53,090,	$65,124,	$66,259,

(Compiled from BR Ex. 1; last three digits of each figure have been dropped so that $41,685,651 reads $41,685).

The source of the funding (ratio of the regular dues to emergency dues) for the dispersals made from the strike fund from November, 1967 to February, 1968 is shown below:[36]

---

[34] T. 6/2/81 at 27; BR Exs. 13,19. While the emergency dues were levied for October and November, 1967, much of those dues were not received by the strike fund until December, 1967 and January, 1968. BR Ex. 1; T. 6/3/81 at 50,51.

[35] BR Exs. 1 and 8. (Note all figures have been rounded to the nearest dollar.)

[36] As of October 31, 1967, the balance of the U.A.W. International Strike Fund was $41,685,651 (BR Ex. 1). The source of this money was substantially regular dues and interest. In November, 1967 the fund took in $14,195,411. Of this income, $2,070,504 can be attributed to regular dues. (This figure represents the average monthly income for the first ten months of calendar 1967 (BR Exs. 1, 8). It does not reflect the extraordinary receipt of $2,000,000 in October, 1967 from the sale of mutual funds. See the Nov. 16, 1967 report.

The remaining $12,124,907 can be ascribed to receipts from emergency dues. Disbursements in November, 1967 totaled $12,544,860.

TABLE II

	Regular Dues %	Emergency Dues %
November 1967	78	22
December 1967	63	37
January 1968	53	47
February 1968	51	49

The ratio of each dollar disbursed in November, 1967 was 78 cents from regular dues and 22 cents from emergency dues.

(Total in fund during month: 55,881,062 = 41,685,651 + 14,195,411. Regular dues in fund: 43,756,155 = 41,685,651 + 2,070,504. Emergency dues in fund: 12,124,907. 43,756,155 divided by 55,881,062 = .78, 12,124,907 divided by 55,881,062 = .22).

The $43,336,203 strike fund balance at the beginning of December, 1967 consisted of $33,971,164 attributable to regular dues [43,756,155 - (12,544,860 × .78)] and $9,365,038 attributable to emergency dues [12,124,907 - (12,544,860 × .22)]. In December, 1967 the fund took in $13,441,418. Of this, $2,070,504 was again attributable to regular dues and the remainder, $11,207,914 represented receipts from emergency dues. Disbursements in December, 1967 totaled $3,686,807.

The ratio of each dollar disbursed in December, 1967 was 63 cents from regular dues and 37 cents from emergency dues. (It should be noted that these figures *under represent* the presence of emergency dues in the fund. In 1967 Emergency dues were only paid in November and December. Exhibit 13 indicates Emergency dues receipts of $24,398,792. The above computations only attribute $23,495,821 to emergency dues income for those months).

The $53,090,814 strike fund balance at the beginning of January, 1968 consisted of $33,718,980 attributable to regular dues [36,041,668 - (3,686,807 × .63)] and $19,271,833 attributable to emergency dues [20,753,952 - (3,686,807 × .37)]. In January, 1968 the fund took in $14,893,039. Of this, $2,070,504 was attributable to regular dues and the remainder, $12,772,535 consisted of receipts from emergency dues. Disbursements in January, 1968 totaled $2,809,765.

The ratio of each dollar disbursed in January, 1968 was 53 cents from regular dues and 47 cents from emergency dues.

The $65,124,088 strike fund balance at the beginning of February, 1968 consisted of $34,300,309 attributable to regular dues [35,789,484 - (2,809,765 × .53)] and $30,823,799 attributable to emergency dues [32,144,269 - (2,809,765 × .47)]. In February, 1968 the fund had income of $6,180,213. Of this $2,070,504 was ascribed to the regular dues and the remainder $4,109,709 was from emergency dues receipts. Disbursements in February, 1968 totaled $5,044,792.

The ratio of each dollar disbursed in February, 1968 was 51 cents from regular dues and 49 cents from emergency dues.

II.

ANALYSIS OF FACTS AND CASE LAW

To answer the question of whether there was, in the context of present day labor relations, a meaningful connection between the emergency dues and the foundry strikes which resulted in the claimants layoffs, we must first consider whether the amounts involved were substantial. Only when the individual emergency dues payments of $10 or $20 a month are compared to the total assets of the International Strike Fund, which fluctuated from $41.6 million to $66.2 million during the period in question, are they insubstantial. By any other measure, those emergency dues were extraordinary. Before and after the emergency dues amendment to the UAW constitution, administrative dues remained at $3.75 a month. By comparison, the strike fund dues increased from $1.25 a month to $11.25 or $21.25 a month, increases of 800% and 1600% respectively.

The $20.00 or $40.00 of increased dues paid by an individual claimant during the two months the increase was effective may not, standing alone, seem a significant amount. However, when that $20.00 or $40.00 sum is viewed as part of a $42,000,000 whole, the UAW succeeded in collecting in $10.00 and $20.00 increments over two months, an amount roughly equivalent to the assets of the *entire* International Strike Fund as it stood at the end of October, 1967, the sum is indeed significant. It is an amount which vividly demonstrates the principle that significant collective gains can be achieved as the result of many modest individual efforts. That principle of "solidarity" is the essence of organized labor.

The striking foundry workers received approximately $247,000 in strike benefits. The 19,000 claimants contributed at a minimum $380,000 ($20 x 19,000) and at a maximum $760,000 ($40 x 19,000) in emergency dues to the strike fund. The UAW controlled the strike fund. The UAW, by their own action, commingled emergency dues with the regular dues already contained in the strike fund.

Because of this action, it can clearly be argued that all of the money paid to the strikers came from the emergency dues paid by the claimants. Under this approach, the amount of emergency dues paid by claimants in relation to the amount of strike benefits received by the foundry workers is clearly "meaningful". However, it could be argued that since the ratio of emergency dues to regular dues fluctuated as money came into and out of the fund, the dispersal should be prorated to reflect the two sources of funding. At the time the foundry workers became entitled to or received strike benefits (end of January, first week of February 1968) the strike fund consisted of money generated 53% from regular dues and 47% from emergency dues (January, 1968) or 51% regular dues versus 49% emergency dues (February, 1968).[37] Each dollar paid to the foundry strikers consisted of either 47 cents or 49 cents prorated to emergency dues. Even under a pro rata method, the Board finds that the portion of strike benefits received by the foundry workers funded by emergency dues was "meaningful" and that commingling regular dues and emergency dues in a common strike fund did not break the "connection" between the emergency dues paid and the strike benefits received.

A second part of the "meaningful connection" test is the purpose for which the money was contributed. We reject the position advanced by the UAW on behalf of its members, the claimants here, that the intent which motivated each individual claimant to pay the emergency dues must be proved before a meaningful connection can be established.[38] The Board finds

---

[37] See Table II, p. 11.

[38] UAW Brief, at 18-42. Section 29(8)(a) provides four separate tests for establishing whether or not a claimant is "directly involved" in a labor dispute. The "same establishment" test contained in 29(8)(a)(iv) clearly operates independently of the intent of the workers invovled and we do not believe the "financing" test in 29(8)(a)(ii) requires any greater showing. Furthermore, while "financing" is one indicia of "direct involvement" the statute dues not specify that only "direct" financing is suspect.

the purpose or intent of the claimants in contributing emergency dues can be established from the statements of the UAW leadership. The amendments to Article 16 of the UAW constitution which established the emergency dues specifically gave the UAW Executive Board the authority to describe and delineate the emergency.[39] The convention call went to all UAW locals.[40] The amendments were adopted by a 98% vote of the delegates to the convention.[41]

The UAW next contends that the emergency dues were implemented solely for the purpose of supporting the strikes then in progress at Ford and Caterpillar. Other than Mr. Wilse's June, 1981 testimony, there is no evidence to support that contention, not the statements made by UAW officials at the Special Convention itself, not their statements as reported in the Detroit papers or UAW publication "Solidarity", not Mr. Woodcock's letter to UAW members employed by General Motors and, perhaps most significantly, not in the amendments to Article 16 of the UAW Constitution.

Neither Section 2(a) nor its companion, Section 10(a), which directed that the Strike Insurance Fund dues be placed in the International Union's Strike Fund, imposed any restrictions on how the revenues generated by the emergency dues were to be used. Theoretically, language limiting use of those dues for the benefit of Ford and Caterpillar strikers could have been added, or the funds otherwise segregated only for the benefit of those workers. No restrictions were imposed and it is likely no amendment levying increased emergency dues on all UAW workers would have been adopted if those funds were in any way restricted.

As noted by the Illinois Supreme Court, in *General Motors* v *Bowling,* 85 Ill 2d 539, 426 NE2d 1210 (1981): "The strike fund

[39]See p. 2 of this decision for the text of the amendments.

[40]UAW "Proceedings" BR Ex. 22, at 6.

[41]UAW "Proceedings" BR Ex. 22, at 72.

is a sort of private insurance against unemployment due to strikes. One does not pay insurance premiums to finance other people's claims, but to provide for one's own need."[42] We believe the convention delegates were motivated, at least in part, by the understanding that if and when members of their own locals were faced with the prospect of a strike, they could draw against the enhanced strike fund.

That the emergency dues were enacted not soley for the benefit of the Ford and Caterpillar strikers is buttressed by the contemporaneous statements of UAW officials Reuther, Mazey, and Woodcock noted above, as well as the "Solidarity" articles, all of which pointed to the possibility that a large strike fund would be needed in the event of a strike at General Motors.

There was no national GM strike in 1967 or 1968, and at the time of the convention when those various statements were made, local GM strikes were only a possibility. However, the Supreme Court directed the Board of Review to take into account "practical considerations and related issues" implicated by the financing question. Among these considerations is the necessity that the MESC be able to respond in a principled manner to claimants, such as these, who are unemployed as the result of local labor disputes and seeking unemployment benefits. When the Commission is deluged with claims, it does not have the luxury of being able to wait and later apply an "after-the-fact analysis" to the situation.[43] The Commission, in such situations, must decide whether or not to pay claimants who have paid emergency dues, when the dues have wound up in the hands of local strikers, and when these strikes have resulted in the claimant's layoffs. Disqualification should not turn on whether the local disputes were isolated and of short duration with relatively small strike fund expenditures, or

[42]426 NE2d at 1213; also see 1967 Ex. 90 at 4.

[43]*Burrell* v *Ford Motor Co.,* 386 Mich 496 at 498 (1971).

widespread and legthy, requiring exhaustion of strike fund assets.

From the perspective of October, 1967, crippling and expensive strikes, both national and local, were certainly within the reasonable contemplation of the UAW leadership. While the locations and issues involved in local disputes could not be specified, such disputes were foreseeable, particularly in light of the history of the 1964 negotiations.[44] To require precise forecasts of how events would develop before finding "financing" would inevitably lead to a holding of no disqualification. However, the inclusion of the "regular dues" exemption in the financing provision implies that the payment of non-regular dues *will* in some circumstances require a disqualification under Section 29(8).

Our belief that the emergency dues were not prompted only by the disputes at Ford and Caterpillar is further supported by the fact that those dues continued to be collected after both of those disputes were settled. Additionally, the UAW letter of November 30, 1967 advised of the suspension of the emergency but went on to say ". . . obviously, the collective bargaining emergency is not yet ended."[45]

Finally, returning to the concept of strike fund dues as being in the nature of an insurance fund, we are not convinced by the suggestion that the payments made by the claimants were not made voluntarily but were made only to avoid discharge by General Motors. The collective bargaining agreement had expired. No union security clause was in effect. No dues check off mechanism was in operation. It is not credible that General Motors would have, on its own initiative, enforced the payment of union dues during the interregnum.[46] There is no evidence any General Motors UAW members were disciplined

[44] Employer Brief at 25.

[45] 409 Mich at 653.

[46] UAW "Proceedings" BR Ex. 22 at 50.

for non-payment of dues for this period. To the contrary, the UAW stipulated that all of the claimants paid the increased dues. There is evidence that the dues were paid voluntarily and the inducement was that the receipt of strike benefits was dependent on UAW members being up to date in their dues. These facts only reinforce the conclusion that claimants anticipated strikes which might affect themselves.

In its directions to the Board, the Supreme Court observed "the statute does not require that payments made by individuals whose disqualification is in issue be traced into the hands of workers involved in the labor dispute which caused the individual's unemployment".[47] That assessment recognizes the reality of the situation before us. In 1967 the UAW had hundreds of thousands of members throughout the United States and Canada. Those members paid emergency dues which were funneled into a common International Strike Fund. From that fund, disbursements were made to striking members — including those at the three foundries central to this case. If "tracing" were required, then the UAW and other large unions would be able to sidestep the financing provision of Section 29(8)(a)(II) simply by virtue of their size.

Three Illinois labor dispute financing decisions were discussed at length in the briefs submitted by the parties and we examine them here. In *Outboard Marine & Manufacturing Co.* v *Gordon*,[48] factory employees in a plant were represented by one union and the office workers in the same plant by another union. By reason of an affiliation agreement between them, the office workers' union agreed to contribute one-fourth of its dues each quarter to the factory workers' union. The factory workers went on strike, and passes were issued to certain personnel to cross picket lines, but none were issued to the office workers who did not work for the duration of the strike. After

[47] 409 Mich at 668.

[48] 403 Ill. 523, 87 NE2d 610 (1949).

the strike, the office workers filed for unemployment benefits which were allowed. A pertinent point among the employer's objections was that the office workers helped to finance the strike by virtue of the fact that one-fourth of their dues payments were forwarded to the factory workers' union. The Illinois Supreme Court disagreed, however, stating:

> "Due to the small number of [office workers'] union members and the low rate of dues collected, the amount transmitted each three months from the one union to the other amounted to approximately $45. In return for this the office workers were to receive certain stationery and office supplies for their use. This amount is small, and is the same amount paid prior to any thought of a srike. *No* transfer of any payment was made during the duration of the strike, nor is there proof that the money previously paid was used in any part for strike benefits or to assist in any particular in prolonging the strike. We agree with the director in his conclusion that the office workers were not financially assisting in the work stoppage." (87 NE2d at 618).

Twenty years later, the Illinois Court of Appeals considered a situation which grew out of the 1970 auto contract talks in *General Motors* v *Bowling.*[49] In that case, claimants were shop clerks at two General Motors facilities in Illinois. They belonged to UAW Local 694. Production workers at those plants belonged to UAW Local 719. Local 719 members struck the two plants but the shop clerks continued to work until they were laid off for lack of work. Prior to the strike, double dues were assessed for several months to build up the strike fund. Unlike the instant case, in *Bowling, after the strike ended,* emergency strike fund dues of $20.00 per member were required from union members, including the claimants who had worked during the strike. Strike benefits were paid from the International Strike Fund to both the production workers and to the shop clerks, pending their receipt of unemployment benefits.

[49]87 Ill App 3d 204, 408 NE2d 937 (1980).

The Illinois Court of Appeals affirmed the disqualification imposed on the claimants. In the court of that decision, the Court of Appeals discussed the application of *Outboard Marine, supra:*

> "We do not believe, however, that *Outboard Marine* is controlling here, where the constitution of the International Union sets dues at two hours straight time pay per month. Since the 275 shop clerks were assessed the double dues to build up the strike fund during the four months prior to the strike, as well as emergency strike fund dues of $20 per member after the strike, it is clear that the amounts were not insubstantial. Further, there is nothing in the *Outboard Marine* opinion to indicate that any portion of the dues contributed to the factory union was to be used either to develop or enhance a strike fund. In fact, is (sic) appears that the small amounts paid were for expenses incidental to the affiliation and for which the office workers union also received all of its stationery, membership cards and bylaw printing. *Here, the doubling of the dues was for the express purpose of building such a fund, and it is undisputed that the strikers benefits from that fund during the work stoppage."*[50] (Emphasis added).

Subsequently, the Illinois Supreme Court overturned the decision of the court of Appeals in *Bowling.* That Illinois Supreme Court decision[51], heavily relied upon by the UAW in its brief in the instant matter, also drew on *Outboard Marine* and applied a "meaningful connection" test citing *Baker* despite the fact the Michigan Supreme Court has not yet defined that phrase with finality. The Illinois Supreme Court went on to

[50]408 NE2d at 943,944.

[51]85 Ill 2d 539,426 NE2d 1210 (1981).

hold that the claimants were entitled to unemployment benefits as they had not, by their dues, "financed" the strike. The court observed:

> "However, the payments were indirect, small and hard to trace. The claimants paid no money directly to the striking local; they paid their dues to the international, where the money was commingled with the dues of all other UAW members around the country. Then, Local No. 719 was not the only local on strike; it got only some small part of the available funds. There is no way to say exactly what money, or how much money, passed from the claimants through the international to the striking workers at the claimants' own plant; and if we assume some sort of fair prorating, the amount in question is clearly insignificant."[52]

It would thus appear that by interposing a large common strike fund between claimants and their striking brethren, the UAW was successful in shielding claimants from bearing any responsibility for the disposition of their dues.

Apparently, the Illinois Supreme Court, would require some sort of tracing. However, that requirement does not square with what the Michigan Supreme Court has already held in the instant case.[53]

Later, the Illinois Supreme Court stated:

> "The essential fact of this case is that it is only coincidence that the shop clerks belonged to the same international union as the strikers . . . The shop clerks should not be denied benefits simply because they were unlucky enough to get caught in the repercussions of a strike at their own plant by people fortuitously associated with the same strike fund. Such a discrimination would be unrelated to any purpose or policy of the statute."[54]

[52] 426 NE2d at 1212.

[53] 409 Mich 668. We further note the Illinois Supreme Court cited Shrader, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U Chi L. Rev. 294, 328 (1950) for the proposition "[t]he financing disqualification has been called a 'dead letter'" (426 NE 2d 1210,1213). We observe that statement was made with regard to financing by means of "regular" dues and we also observe the same article was cited by Justice Leven in *Baker* itself 409 Mich at 656 n. 11. Evidently the Michigan Supreme Court does not consider financing a "dead letter" or it would not have remanded this matter.

That formulation ignores the reality of much of modern labor relations — the confrontation of large labor organizations and large corporate employers. The fact of the matter is that the Illinois claimants, just as the present Michigan claimants, *did* belong to the same international union. They *did* make extraordinary payments into the international strike fund and the strikers *did* receive benefits from that fund. The connection between the strikers and claimant was something more than a "fortuitious association."

III. CONCLUSION

The Michigan Supreme Court has already decided the claimants' emergency dues were not regular dues and the foundry strikes caused the claimants' unemployment. The Court remanded *Baker* to the Board of Review to decide if there was a "meaningful connection" between the emergency dues payments and the foundry strikes. Whether, under MCLA 421.29(8)(a)(ii) the claimants are disqualified from receiving benefits during the period of layoff depends on such a connection being made. The employer normally has the burden of proof of all essential elements in a labor dispute disqualfication.[55] In determining whether that burden was met, the Board considered the following factors.

> PURPOSE — Did the scope of the bargaining emergency for which the emergency dues were collected include local GM labor disputes?

[54] 426 NE2d at 1213.

[55] *Michigan Tool Co.* v *ESC*, 346 Mich 673, 78 NW2d 571 (1956); *Smith* v *MESC*, 410 Mich 231, 301 NW2d 285 (1981).

The claimants argue that the intent of the UAW leadership cannot be considered the intent of claimants. The Board rejects this argument.[56] Based on the text of the amendments to the UAW constituion providing for the collection of emergency dues and statements of purpose made by UAW leaders in the official minutes of the convention, in the press and in the letter of early December, 1967 — which suspended the emergency dues payments, but went on to note "the collective bargaining emergency is not yet ended" — the Board finds that the emergency dues were intended to fund local labor disputes at GM facilities. If the essence of the UAW is *solidarity,* the essence of GM is the assembly of automobiles — in a word — *production.* If foundry workers struck, it was foreseeable that production and maintenance workers, such as claimants, would be laid off. Indeed, these layoffs put additional pressure on GM to settle the local foundry disputes. The claimants or their representatives voted to authorize local strikes and to pay emergency dues to help fund those strikes. The claimants were not mere victims of circumstances, but rather participants in the collective bargaining of new, local, auto contracts.

AMOUNT — Were the emergency dues a substantial source of funding for the local foundry strikes?

The foundry workers who went on strike received $247,000 in benefits from the strike fund. The UAW argues in its brief that under standard accounting procedures, such as LIFO and FIFO, the strike benefits could have been paid entirely out of regular dues. However, the record shows the claimants paid between $380,000 and $760,000 of emergency dues into the UAW Strike Fund and we could easily assume that the entire cost of the foundry strikes was financed solely out of emergency dues payments made by the involved claimants. We will not

[56] *Applegate* v *Palladium Publishing Co.,* 75 Mich App 299 (1980), Lv den, 409 Mich 904 (1980).

engage in such speculation in either direction. The fact remains that the UAW must bear responsibility for commingling the emergency dues receipts with other strike fund assets. Tracing of the emergency dues is not possible and Justice Levin acknowledged that precise tracing of the money is not essential to the finding of a meaningful connection. Nevertheless, charged with the duty of determining the existence, if any, of a meaningful connection and faced with the obstacle created by the commingling of the funds, the Board concludes that a pro-rata analysis should be utilized. That analysis results in a finding that forty-seven cents of every dollar of strike benefits dispersed in January, 1968 came from emergency dues. We find this amount substantial. We do not need to decide in this case what lesser ratio would be de minimus.

TIMING — Were the emergency dues payments and the subsequent pay-out of strike benefits sufficiently proximate so as not to sever the meaningful connection of the above factors?

MCLA 421.209(8)(a)(ii) provides for a disqualification if an "individual . . . is . . . financing" the labor dispute. Use of the present tense indicates that collection of non-regular dues and the payment of strike benefits be proximate in time. The Board finds that the payment of emergency dues, as late as January, 1968 was sufficiently proximate with strike benefits paid in late January or early February, 1968. The build-up of a strike fund prior to a strike action is a typical strategy in modern-day collective bargaining. Indeed, the UAW leaders used the argument that extra money into the strike fund at the outset would give the union better bargaining position in the national and local negotiations. To require that the period of the strike and the collection of emergency dues overlap is too rigid a reading of the "is . . . financing" language of the statute.[57]

[57] See p 10, Table I. Even though the emergency dues were suspended at the end of November, 1967, the bulk of the emergency dues were received into

The Board finds that the lapse here of a few weeks did not sever the "meaningful connection" and satisfied the "is ... financing" requirement. We note that timing is also a dimension in the previously considered pro-rata tracing formula. Once the flow of emergency dues into the strike fund stopped, the percentage of emergency dues in the fund would decrease as dispersals were made and the fund was replenished only by regular dues.

The Board has considered three factors — purpose, amount, timing — related to whether the record establishes a "meaningful connection" between the emergency dues paid by the claimants and the strikes which caused their unemployment. Based on the answers to those questions, the Board finds that the employer has met its burden of proof. We agree with the Court of Appeals that the claimants are disqualified during the weeks ending February 3, and February 10, 1968 under Section 29(8) of the Michigan Employment Security Act.

/s/ James Viventi
James Viventi, Member
/s/ Morris W. B. Cohl
Morris W. B. Cohl, Member

BEVERLY A. HALL (CHAIRPERSON), CONCURRING:

I concur with Members Viventi and Cohl in finding that claimants are disqualified for having financed a labor dispute.

---

the fund in December, 1967 and January, 1968. Also, mere lapse of time in a negligence action does not break proximate causation. *Parks* v *Starks*, 342 Mich 443 (1955); *McKine* v *Sydor*, 387 Mich 82 (1972); *Jacobs* v *Martz*, 15 Mich App 186 (1968). Those cases also quoted with approval the following from 38 Am Jur, Negligence, Subsection 55, p 703:

> " 'The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time, distance, or space. Assuming that there is a direct, natural, and continuous sequence between an act and an injury, * * * the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance.' "

However, I believe that a "meaningful connection" and financing can be ascertained in a more practical and expedient manner by Commission personnel with the application of a test designed to show commonalities of interest and shared objectives between those workers on strike and the workers who become unemployed due to a labor dispute.

The Supreme Court found as fact that the plaintiff's unemployment was due to a labor dispute in active progress at functionally integrated General Motors plants. Having established that the basic disqualification provision of the Act (MCLA 421.29(8); MSA 17.531(8)) is applicable, the next inquiry with regard to the claimants is whether they were directly involved under MCLA 421.29(8)(a)(II), which states:

> "(a) For the purpose of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
>
> (II) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph ..."

The Supreme Court agreed with the Court of Appeals that the temporary emergency dues paid by the UAW members for October and November, 1967 were not "regular" but rather, were "extraordinary" dues. However, the Supreme Court remanded this matter to the Board of Review in order to explain the concept of "financing". The Court rejected the notion that given the parenthetical language of the statute, if the dues were other than regular, ipso facto, they constituted financing of the labor dispute. In order for financing of a labor dispute to be established, thereby barring receipt of unemployment benefits, a meaningful connection must be shown

between the payment of the extraordinary dues and the claimant's unemployment.

In order to establish a meaningful connection, a discussion of the underlying facts leading to a claimant's unemployment is required. On September 6, 1967, all national and local contracts expired in the automobile industry. The local agreements had no independent expiration date separate and apart from the national agreement. Customarily, national agreements are bargained first, but testimony from Byron Crane, Jr., Director of Labor Relations for GM, made it clear that notwithstanding settlement of the national agreement there can be no labor peace without settlement of the local agreements; that even after a national agreement had been reached, local agreements also had to be bargained to a conclusion, "either by agreement or through strike action or whatever was deemed to be locally required by the union." (June 22, 1985; pp. 8,9). Prior to and during the national Ford strike, which had its inception at the time the collective bargaining agreements expired in September, 1967, the UAW and GM engaged in peaceful good faith collective bargaining on the national agreement.

During October, 1967, the UAW called a special convention for the purpose of amending its constitution to provide for "emergency dues." However, during that same month a few weeks later the Ford and Caterpillar strikes ended. (Brief of claimants, p. 8). The testimony of Jerry Wilse, Director of the Strike Insurance Fund for the UAW, established that the first dues pursuant to the new amendment were received approximately November 1, 1967 and continued to be collected until at least December, 1967. It was stipulated by both that claimants paid those emergency dues.

During the time those dues were being collected, local issues at some plants had not been resolved, while the new national agreement was in the stage of being ratified by the membership for implementation on January 1, 1968. As planned by the bargainers, the push during the months immediately following

expiration of the national and local agreements was to settle the national dispute first; however, the local issues were a necessary and integral part of the bargaining scheme, which could not be concluded until the local matters were settled. The testimonty of Mr. Crane substantiates this as follows:

> "MR. CRANE: I was present: At that time, particularly in the 1967 negotiations, it was understood — it was not a formal written agreement — that we would approach the sequence of local negotiations in the manner in which I previously described, that is, those plants which were not settled at the time we had national negotiations resolved that we would direct our energies first toward the basic manufacturing, to be followed by the components, to be followed by the end-product plants.
>
> Q. (By Mr. Mayman) What part would the national parties play in these local negotiations again from 1958 to 1967?
>
> A. Generally speaking, if there was an authorization for a strike it was the policy of the international unions to have a representative of the General Motors Department present at the plant. We would also have a representative from the corporation, and also maybe a representative of a multi-plant division, such as Chevrolet Fisher Body or the like.
>
> Q. Would the international also have representatives at these locals negotiations?
>
> A. Yes, that's what I said. The international union would have a representative present and we would also be there.
>
> Q. In the context again of the 1967 labor dispute and the pattern that developed through that point, were the basic manufacturing plants, then the component plants, and the end product plants handled pretty much the same way?

A. It was that routine that was followed following the national agreement achieved, I think in 1967. We first went into the basic manufacturing plants, the foundries and others that were not yet resolved.

Q. Subsequent to 1958, again in the context of the national contract resolution, has there ever been a situation where there had been no local strikes?

A. No. None. There has never been such a situation.

Q. With regard to the involvement of the national parties in local negotiations, I think you testified about the 1967 situation, was that also the same from 1958 through 1967 and from 1967 on through?

A. Yes, sir." (June 22, 1981, pp. 23, 24).

It is a matter of history that the UAW and GM reached agreement on the national issues on December 15, 1967 and that agreement was ratified by the membership, and became effective on January 1, 1968. Yet, labor peace and the end of the dispute was not achieved inasmuch as many local contracts had not been settled at individual plants. It is claimants' position that *"if* local labor disputes existed in 1967, they ended on December 15, 1967 and did not again commence until after January 10, 1968 when the UAW notified GM to waive the no-strike clause for certain locals . . . given on January 12, 1968." (Brief of claimants, p 11). Subsequent events defy claimants' assertion that the disputes ended on December 15, 1967. It is clear that local controversies did persist, that negotiations did break down, and that resolution would be sought through strike action. That strike action caused the shutdown or cutback in production at other GM plants in Michigan, effectuating the layoffs of over 19,000 workers who were fortunate enough to have settled their own particular local agreement, or who may not have entered into local bargaining yet as a consequence of the pattern of bargaining established by the parties. It is clear that the pattern of bargaining, i.e. beginning with certain plants first, may cause a

delay in the outward manifestations — such as strikes or slow downs — of a controversy at other plants. But, that does not mean those other controversies over local issues do not exist. For certain plants, a labor dispute may not be clearly evidenced until long after the conclusion of the national agreement. In other words, as a direct result of the historically established pattern of bargaining between GM and the UAW, a labor dispute may smolder for a prolonged period of time before it erupts into a strike. In order to establish financing, it should not be a requirement that an extraordinary dues obligation extend until the last local issue is resolved.

The resolution of local issues may often depend on the outcome of related issues in the national contract. However, it is clear that although national and local contracts expire on the same date, the parties remain armed and geared for economic warfare past the implementation date on a new national agreement and local controversies take center stage ad seriatim, thereby extending the bargaining emergency.

The disqualification provision for financing was designed to catch conduct that would tend to prolong a labor dispute. That provision should not be interpreted in a manner that would render the statute a nullity. On the other hand, it should not be interpreted so narrowly as to be contrary to the remedial and liberal purposes of the MESA. In this case, however, the claimants should be disqualified for financing because a meaningful connection can be shown through commonalities and shared objectives between the workers strike in Saginaw, Michigan; Defiance, Ohio; and Tonawanda, New York and the unemployment of the Michigan claimants as a result of that strike.

As in other areas of law concerned with determining the intent of a party by tracing its financial transactions over a period of time, such as in acts of bankruptcy or transactions incurring tax consequences, an examination must be made in this case to determine whether certain financial arrangements

were instituted in close proximity to an event that would have serious consequences for the party involved, to wit, were financial arrangements being made by the union in anticipation of the expiration of the collective bargaining agreement, or the sending of a strike notice, or a notice not to renew a collective bargaining agreement? In this case, the commonality that affected the workers at the three GM foundries and the claimants in Michigan was the sending of the sixty-day notice that advised the employer that the national agreement would not be renewed. The national agreement is the tie that binds all the involved workers, and runs to all of them and their local contracts from the date of implementation to the date of its termination.

The second commonality is that at some point in close proximity to the notice of reopening, or the expiration of the national agreement, or the sending of strike notices, an increase is effectuated by the union in the existing dues structure that is anticipated as being temporary. The strikers and claimants alike must share the burden of paying the increased dues, and a generous percentage of that increase flows into the local treasury serving both strikers and claimants.

The third commonality is that the labor dispute must be precipitated by the same event, in this case, the termination of the national agreement and the local agreements on the same date. Although all the workers are affected by the terms and conditions of the national agreement, the local issues are, in reality, an extension of the bargaining after the national issues have been resolved. Some locals are able to resolve their disputes with the employer contemporaneously with the national agreement. Other locals, such as the foundries here, may not be able to resolve their differences due to problems peculiar to their particular circumstances. The payment of strike benfits which caused the unemployment of the claimants, all of whom shared in the bargaining results from the date of termination, should disqualify claimants for having financed the extension of a labor dispute.

Because the employer and the union orchestrate the sequence of the bargaining from the national agreement first, through the local agreements in order of the manufacturing process, the simple reliance on the date of inception of the more dramatic manifestations of a labor dispute, such as as strikes, should not be determinative of whether financing is found to have taken place. Avoidance of the disqualification could easily be manipulated if that were the case.

The Supreme Court has not required that dues be traced directly from the hands of the claimants to the pockets of the strikers. However, a meaningful connection should entail a showing of shared risks and obligations by both the donor and the donee, and such a connection is manifest here.

/s/ Beverly H. Hall, Chairperson
Beverly H. Hall, Chairperson

THOMAS L. GRAVELLE (MEMBER), DISSENTING:

Strikes in early 1968 over local issues at three of the employer's plants caused the claimants — who worked at other plants of the employer — to be laid off.[1] The issue before us is whether the claimants were financing the labor dispute causing their unemployment by reason of their emergency dues payments to the union strike insurance fund for October and November of 1967. In remanding this issue to us, the Michigan Supreme Court explained that "the term 'financing' suggests a meaningful connection between the payment or class of payments said to constitute financing and the labor dispute allegedly financed."[2] The supreme court directed us to take into account "practical considerations and related issues implicated by the question."[3] The court requested "a liberal construction . . . consonant with reason and good discretion."[4]

---

[1] *Baker* v *General Motors Corp*, 409 Mich 639, 653 (1980).

[2] *Id* at 668.

[3] *Id.*

[4] *Id* at 664 (citations omitted).

I

In October, 1967, the UAW membership amended the UAW constitution to provide increased dues for the union's strike insurance fund.[5] Before the amendment, the constitution stated: "Commencing with the month of January 1960, Union administrative dues shall be three dollars and seventy-five cents ($3.75) per month and Union Strike Insurance Fund dues shall be one dollar and twenty-five cents ($1.25) per month.[6] Under the 1967 amendment, union administrative dues of $3.75 per month were continued unchanged.[7] But dues for the strike insurance fund were increased to $11.25 per month for members earning less than $3.00 per hour or $21.25 per month for members earning more than $3.00 per hour.[8] These increases were paid only for October and November, 1967. They were "waived for the month of December, 1967 and the month of January, 1968."[10] Union members paid them directly to their local union which remitted them to the international union.[11]

At the time of the dues amendment, a national strike was taking place against Ford, and negotiations with General Motors were pending.[12] The Ford strike was a major reason for the amendment.[13] But the pending negotiations with General Motors were also a reason. Various UAW leaders suggested

---

[5] *Id* at 651-52.

[6] Appendix for Plaintiffs-Appellants, p 37a.

[7] *Id* at 61a.

[8] *Id* at 61a-62a; Baker, 409 Mich at 561-52 n. 4.

[9] Appendix for Plaintiffs-Appellants, p 54a; *Baker,* 409 Mich at 652.

[10] Appendix for Plaintiffs-Appellants, pp 35a-36a.

[11] *Id* at p 45a.

[12] *Baker,* 409 Mich at 649, 651.

[13] Transcript, June 2, 1981, at p 25.

that a large strike insurance fund would be desirable if future negotiations with General Motors failed.[14]

General Motors and the UAW conducted their negotiations at the national level and the local level. A single agreement was sought nationally. Locally, numerous issues limited to individual plants were addressed.[15] In 1964, there had been a number of local GM strikes over local issues.[16] In these circumstances, at the time the emergency dues were paid, it was conceivable that there *might* be *some* local GM strikes over local issues in the *future*, *i.e.*, after a national agreement had been reached. But at that time no one could foretell their number or location. This much was conjectural.[17]

A national agreement between General Motors and the UAW was reached in mid-December, 1967 without a strike.[18]

---

[14] *See, e.g., Detroit News,* Sept 10, 1967 at p 3A, 1981 BR Ex 31g (statement by UAW president Walter Reuther); UAW "Proceedings" 1981 BR Ex 22 at 47 (statement at UAW convention by UAW secretary-treasurer Emil Mazey); 1967 Ex 90 (letter dated October 13, 1967 from UAW vice-president Leonard Woodcock to all UAW members in General Motors plants and warehouses, USA). These statements are admissions of the reasons for the dues increase and are binding on the claimants. *Jozwik* v *Employment Sec Comm'n* 30 Mich App 506, 524-25 (1971); *Vickers* v *Employment Sec Comm'n* 30 Mich App 530, 545 (1971). *Cf Burrell* v *Ford Motor Co,* 386 Mich 486, 498 (1971) (claimants relied on "a statement in the 1964 Annual Report of the Ford Motor Company . . . and . . . articles in the *Wall Street Journal* quoting Ford officials"). MRE 902(6) states that extrinsic evidence of authenticity is not required for the admissibility of newspapers and periodicals.

[15] 1981 BR Ex 31 (i).

[16] 1967 Ex 90; Transcript, June 22, 1981, pp 19, 28.

[17] The 1967 Annual Report of the General Motors Corporation stated:

> "Following ratification of the national agreement, every effort was made to settle unresolved local issues. Toward the middle of January, 1968, it became apparent that differences existed at a number of locations." Appendix for Plaintiffs-Appellants, p 38a. This statement shows that local issues did not really ripen into actual controversy until several weeks *after* the emergency dues had been suspended. The statement is an admission, as the statements *supra* note 14 are admissions.

[18] *Baker,* 409 Mich at 653.

In mid-January, 1968, three local GM strikes began which caused the claimants — who worked at other GM plants — to be laid off for lack of work.[19] Those on strike received payments from the union's strike insurance fund.[20]

II

At the time this case arose, Section 29(8) of the MES Act stated in pertinent part: "He is ... financing ... the labor dispute which causes his ... unemployment."[21] The plain meaning of this language is that the claimant must be currently financing the labor dispute.[22] The statute says "is ... financing;" it does not say "financed". For a claimant to be disqualified, it is not enough that a *future* labor dispute is a possibility at the time he allegedly finances it. A meaningful connection requires that the claimant's funding be contemporaneous with the labor dispute causing his unemployment.[23]

---

[19] *Id*

[20] *Id*

[21] MCL 421.29(8). The financing language read in its entirety:

> "He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph ..."

Section 29(8) has since been amended in various minor ways having no bearing on the resolution of the present case. Section 29(8)(a)(ii), the present financing provision, states:

> "The individual is participating in or financing or directly interested in the labor dispute which causes the individual's total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute within the meaning of this subparagraph."

[22] The plain meaning rule is often used by the Michigan Supreme Court in reading the MES Act. See, *e.g., Baker,* 409 Mich at 665 (*citing Bingham* v *American Screw Products Co,* 398 Mich 546, 563 (1976) (per Williams, J)). See also *General Motors Corp* v *Erves,* 399 Mich 241, 253-54 (decision on rehearing) (per Coleman, J).

[23] A more expansive reading of the phrase "is financing" "would require us to ignore the clear language of the statute and to decide issues of policy reserved to the legislature." *Smith* v *Employment Sec Comm'n,* 410 Mich

In addition, the claimant is not to be disqualified under Section 29(8) merely because he is currently financing *any* labor dispute. To be disqualified, he must be currently financing the labor dispute "which causes his ... unemployment."[24] But even here, he cannot be disqualified if the labor dispute causing his unemployment is funded by "[t]he payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute)."[25]

With these rules in mind the present case may now be decided. The labor dispute causing the claimants' unemployment was either of two events: the three local strikes in 1968 *or* the negotiations at the local level preceding these three local strikes. In neither event may the claimants be disqualified. If the three local strikes were the labor dispute, the claimants would not be disqualified because their alleged financing occurred before the labor dispute came into existence. It was not until early 1968 that the local strikes began, whereas the alleged financing of these strikes was for the months of October and November, 1967.[26] Nor would the claimants be

---

231, 255 (1981). *Cf Great Lakes Steel Corp* v *Employment Sec Comm'n,* 6 Mich App 656, 662 (1967) ("[I]n Michigan we follow the rule of statutory construction that requries a 'liberal' construction to afford coverage and a 'strict' construction to effect disqualification"), *aff'd,* 381 Mich 249 (1968); *Linski* v *Employment Sec Comm'n,* 358 Mich 239, 245 (1959) ("We can find no warrant for adding to the contract penalty still another penalty not squarely spelled out in the statute").

[24] MCL 421.29(8); *Baker,* 409 Mich at 668. *Cf Burrell* v *Ford Motor Co,* 386 Mich 486, 497 (1971) ("In this case, it was not the labor dispute over the national agreements that caused claimants' unemployment. The curtailment of production as a result of the *local* labor disputes caused the unemployment") (emphasis in original).

[25] MCL 421.29(8).

[26] "Contemporaneous" does not imply an exact correspondence between the periods of time involved, as does "synchronous" or "simultaneous." Thus, in the present case, if the emergency dues obligation had continued for December, 1967 and January, 1968, the claimants' funding would have been contemporaneous with the strikes even if dues were waived *during* the strikes because the claimants were unemployed.

disqualified if the labor dispute were the local negotiations preceding the local strikes. The reason is that these local negotiations were not financed by the emergency dues increase. Rather, these negotiations were apparantly financed by "[t]he payment of regular union dues . . . in amounts and for purposes established prior to the inception" of the local negotiations.[27]

Unemployment insurance is designed to relieve the hardship caused by involuntary unemployment.[28] The claimants' unemployment was involuntary. In 1967, union members voluntarily amended their constitution: by doing so they did not elect unemployment in 1968. The claimants were laid off; they did not choose to be laid off actually or constructively.[29]

III

A major practical consideration in support of this opinion is that it may be readily used as a yardstick to measure financing issues in the future. First, the labor dispute causing a claimant's unemployment is identified. Second, the times of the claimant's alleged financing/and of the labor dispute causing his unemployment are compared. If the contributions in issue either are not contemporaneous with the labor dispute causing the unemployment *or* do not subsidize the labor dispute causing the unemployment, no disqualification can result.

The present case began in 1968 and is not yet over. It is a reminder that promptness in unemployment insurance law is a vain hope when the law is not properly understood. I think my reading of the law will allow future financing issues to be

---

[27] *MCL* 421.29(8). It is noted without deciding that GM may possibly have financed the local negotiations. It might be argued that GM did if it had paid the local union bargaining team for lost time while negotiating.

[28] *Baker*, 409 Mich at 664.

[29] Long ago, the Michigan Supreme Court rejected the idea of constructive voluntary unemployment in another case involving collective bargaining. *Copper Range Co* v *Unemployment Comp Comm'n*, 320 Mich 460, 467, 470-72 (1948) (claimants did not voluntarily leave work by refusing to agree to concessions that arguably would have saved their jobs).

decided promptly, fairly, and clearly. My reading is faithful to the plain meaning of the statutory text. It is easy to understand. It should not raise more questions than it answers.

/s/ Thomas L. Gravelle
Thomas L. Gravelle, Member

FRANK SALOMONE (MEMBER) DISSENTING:

I concur with member Gravelle that the claimants should not be disqualified for benefits under the financing provisions of Section 29(8) of the MES Act, not only for the reasons presented in his opinion, but also on other alternative grounds.

The first and more obvious ground is that the claimants should not be disqualified for benefits because the record does not show that the extraordinary dues collected were used to aid the workers who were engaged in the strike which caused the claimants' unemployment. In fact, a careful reading of the record demonstrates that no extraordinary dues were used. The fact that the extraordinary dues were placed with the regular dues is not determinative that such funds were used. We are not dealing here with a case of fraud or a breach of fiduciary duty. What is determinative is the action of the union in stopping the further collection of extraordinary dues as soon as it became evident that there would be no national strikes. Clearly the intent was to use these extraordinary dues to finance *national* strikes, especially in the auto industry. As soon as these problems were averted, there would no longer be a need to finance the strike insurance fund by these extraordinary means. Further, the record shows that the union had over $41,500,000 derived from regular union dues. Considerably less than 1% of this amount (less than $250,000) was used in the local strikes that caused the claimants' unemployment.

The letter cited by the Supreme Court (footnote 5 of their opinion) is evidence that the union was not relying on extraordinary dues to finance any local disputes when the union, after eliminating the extraordinary dues, reverted to regular dues.

Therefore, by looking at the *intent* of the union and applying a little common sense when looking at the common fund, it is obvious that different uses of the dues were contemplated, i.e. the extraordinary dues for national strikes, and the regular ordinary dues for local strikes.

The second ground for finding no disqualification of the claimants under the financing provisions of Section 29(8) of the MES Act is also based on a common sense approach. Assuming *arguendo* that it could be proven that the extraordinary dues were used to finance the local strikes, I would still find the claimants not disqualified for benefits. As stated before, the *purpose* of the extraordinary dues was to finance national strikes. If this were not the case, there would be no reason for the union to stop the collection of those dues until all local issues were settled.

In *General Motors Corporation* v *Bowling*, 85 ILL 2d 539 (1981), the Illinois Supreme Court noted: "The strike fund is a sort of private insurance against unemployment due to strikes. One does not pay insurance premiums to finance other people's claims but to provide for one's own need." Certainly the claimants in this case *did not voluntarily in a meaningful connected way* have in mind supporting strikes in other establishments of foundry workers who were in a different grade and class and who were so far removed from the claimants. Even if the foundry workers' plants were functionally integrated with the claimants' plants herein, how can it be contended that payment of extraordinary dues by the workers were voluntarily paid for such *remote purposes?*

As stated in the *Bowling* case, *supra*, "The word 'financing' moreover implies something active and voluntary. If the city paid strike benefits, that would not make every taxpayer a financer of the strike." Even assuming that the intent of the UAW leadership constitutes the intent of each of the claimants (an assumption that I do not concede), there is nothing in the

record to indicate that the UAW was concerned with anything other than using extraordinary dues for national strikes. This intent and purpose is demonstrated by the fact that once the threat of a national GM strike was averted by acceptance of a national agreement, the extraordinary dues were stopped. (The national Ford strike had previously been settled.)

The fact that the UAW indicated that the collective bargaining emergency is not ended does not change that intent or purpose. On the contrary, it reinforces it because if many local strikes were contemplated at that time, or if the claimants' unemployment had been so foreseeable, as alleged by the employer, this is all the more reason to conclude that the UAW would not have stopped the extraordinary dues. Moreover, it is simply wrong to equate "emergency dues" with "collective bargaining emergency." A collective bargaining "emergency" can exist without the use of "emergency" dues.

It is, therefore, an inescapable conclusion that the claimants did not voluntarily intend, nor did the UAW intend, that extraordinary dues be collected to provide an extra measure of strike insurance protection for possible future GM local strikes. The allegations of the employer failed to prove that the claimants should be disqualified under the financing provisions of Section 29(8) of the MES Act.

Finally, the payments from the strike insurance fund which might conceivably be attributable to the claimants in this case are indirect and *de minimus*. See the *Bowling* case, supra. The employer argues that Bowling is incorrect and that under it, no disqualification could ever be found where the union created a large common strike insurance fund. This is not so because the *Bowling* decision expressly recognizes purpose, intent, and voluntariness as involved in attempting to show a meaningful connection. A careful review of the record in this case shows no meaningful connection. Although a meaningful connection may exist in other cases, there is not one here.

For the foregoing reasons, and because of the remedial purposes of the Act, it would, in my opinion, be unconscionable under the circumstances in this case to deny the claimants unemployment benefits.

/s/ Frank Salomone
Frank Salomone, Member

Dated and Mailed at
Detroit, Michigan on
June 10, 1982

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of April in the year of our Lord one thousand nine hundred and eight-five.

Present the Honorable G. MENNEN WILLIAMS, Chief Justice, CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, Associate Justices.

Rehearing No. 128

A. G. BAKER, JR., et al, Plaintiffs-Appellants,	SC 59861-3
v	CoA 24150, 24083-4
GENERAL MOTORS CORPORATION Defendant-Appellee	Wayne Cir #72-211-596
and	Ingham Cir
MICHIGAN EMPLOYMENT SECURITY COMMISSION, Defendant-Appellee.	#73-14581-AE Genesee Cir #77

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

[Certification omitted]

REGION 31 NLRB LETTER DATED NOVEMBER 20, 1967 RE: UAW DUES CHANGE

Maxcy D. Filer, Esquire
542 West Arbutus
Compton, California 90220

Re: United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) Locals 87 & 148 (North American Aviation, Rockwell Corp.; McDonald Douglas) Case No. 31-CB-286

Dear Mr. Filer:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. Viewing the circumstances overall, including the Union's long established history of including payments to the strike benefits funds as a regularized part of its periodic dues structure, the fact that the increase in the strike benefit portion of the periodic dues was wholly consistent with that history and was adopted pursuant to a special convention duly called for that purpose, the fact that the express purpose of the increase was to prevent depletion of the strike benefit fund during present and possible future strikes, the fact that the size of the increase, though substantially more than minimal, was a reasonable accommodation to the existing rate of depletion of the strike benefit fund as well as a considered accommodation to possible future demands upon that fund, and that the increase was directly related to the Union's carrying out its bargaining obligation to all the employees it represents, the conclusion was warranted that the increase did not constitute a "special tax" or assessment but constituted rather a permissible change in "periodic dues" within the meaning of the Section 8(a)(3) proviso.

With respect to the 8(b)(5) allegation of the charge, it was concluded the legislative history, as well as the literal language of Section 8(b)(5), makes clear that this section applies to initiation fees and not to "dues" and would accordingly be inapplicable in the instant case. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C., 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on December 4, 1967. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

Very truly yours,
PAUL A. CASSADY
Regional Director

NLRB GENERAL COUNSEL'S LETTER DATED FEBRUARY 9, 1968 RE: UAW DUES CHANGE APPEAL

[Letterhead Omitted]

February 9, 1968

Re:
U.A.W., Locals 887 and 148
(North American Aviation, Rockwell Corp.;
McDonald Douglas)
Case NO. 31-CB-286
U.A.W., Local 179 (Bendix)
Case No. 31-CB-298-1
U.A.W., Local 805 (Robertshaw Controls, Grayson

Control Div.)
Case No. 31-CB-298-2
U.A.W., Local 509
(Emery Industries, Inc.)
Case No. 31-CB-298-3
U.A.W., Local 509
(Norris Industries)
Case No. 31-CB-298-4
U.A.W. (I.T.T. Cannon Electric)
Case No. 31-CB-298-5

Maxey D. Filer, Esq.
542 West Arbutus
Compton, California 90220

Dear Mr. Filer:

Your appeal from the refusal to issue complaint in the captioned cases, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. Further proceedings herein were unwarranted substantially for the reasons set forth in the Regional Director's letters to the parties dated November 20 and November 22, 1967, respectively.

Very truly yours,
ARNOLD ORDMAN
General Counsel
By: /s/ IRVING M. HERMAN
Director, Office of Appeals

* * *

U.S. District Court,
Central District of California

COLE, et al, v. LOCAL UNION No. 509, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, No. 67-1651-WPG, March 11, 1968

* * *

Full Text of Oral Opinion

GRAY, District Judge: — Well, gentlemen, I have been very much interested in this case, and I have devoted quite a bit of time to considering the ramifications of it.

This is one of my first exposures to union-employee relationships, but the defendants first contend that the plaintiffs failed to seek their remedy within the union as they are required by 29 United States Code, Section 411(a)(4) to do. It says that any such member may be required to exhaust reasonable hearing procedures within such organization before instituting legal or administrative proceedings against the organization or any officer thereof, and it does seem to me that this section has some meaning. Grievance procedure is provided for, and I don't think it is fair to the union for the union members to litigate their dispute for the first time in Federal Court. This is, first-off, an intra-union affair.

There is also provision, insofar as the second cause of action is concerned, if there is a union-employer dispute or if there is a dispute pertaining to a union matter between the union member and its union-employer, there is a provision under the agreement for those matters to be resolved, and I just don't think it is fair to the employer to sign a collective bargaining agreement with the union who is undertaking to represent its employees, and then to have the employers subjected to a dispute in Federal Court without making any effort to exhaust those possibitilies.

I also think that a court should be slow to interfere and to inject itself at the stage of the affairs where we now are. I

think *Republic Steel* v *Maddux* indicates the court should have a reluctance to do so, and so one of the reasons why this Court is not disposed to entertain the plaintiffs' action is because of its failure to have sought relief within the union first and also in accordance with the grievance procedures provided for in the union-management contract.

Assuming that we should entertain this dispute under Title 29, Section 412 or Section 185, the first thing that is quite apparent is that we are concerned with Section 411 (a)(3)(b), namely, we are concerned with an international union, and apparently the plaintiff agrees with that. I assume that the defendants were kind of setting up straw men when they argued so vehemently that this was the statute concerned. I don't think there is ever any dispute about that. Certainly it is the holding in Ranes against the union, 317 Fed. 2d, and apparently *Musicians* v *Wittstein* also indicates that.

So we are brought to 411 (a)(3)(B), and the first question is the sufficiency of the notice. The notice says that there shall be 30 days written notice to the principal office of each local union entitled to receive notice, and that is exactly what they received. So as far as the time is concerned, it seems to me that I can come to no other conclusion than that the exact provisions of the statute were adhered to.

Now, the plaintiff says that there was no meeting or notice to the members and no opportunity for discussion. Well, in the first place, the statute doesn't say that there has to be, and I think in relation to matters of this kind I am pretty much bound by what the statute provides, and also the Landrum-Griffin Act didn't talk in terms of a democracy required a town meeting. It imposed certain requirements with respect to representative government, and that is what we have here, and I find nothing in the Act or the philosophy within the Act that says on every issue that is a matter of federal concern that there be thorough discussion within the union. It seems to me that that is a matter for intra-union affairs, and if the

delegates are not sufficiently interested to find out what the union members want, why, then that is a matter for the union members to consider when the time for re-election comes up.

It seems to me that the statute here would be tremendously stultified if it were required that in order for the statute to be effective every union must have full discussion on each issue coming up before the convention — must have full discussion with respect to dues increase before there can be any such increase upheld, and as far as subject matter is concerned, I have read the Mazey telegram, and I find that the notice of the subject matter is adequate, even assuming that there has to be notice with respect to the subject matter.

It hadn't occurred to me, the interpretation Mr. Arnold put on the statute. There may be some merit in it. I bypass that. I say that even if notice of the prospective dues increase is required that the notice that was sent does fulfill the requirements of the law in that respect.

The telegram said, "We are going to consider revision," and I believe that the phrase "consider revision" could include "consider increase" certainly under the circumstances.

Elsewhere in the telegram with reference to emergency, the actualities of the circumstance must indicate to any reader of the telegram that a revision is going to be considered, and "consider" means a polite way of saying, "We are going to take action with respect to it."

All right. I believe, as I say, the statute requires representative government and that the requirements of representative government were adhered to here, so I find that the notice sent out by the union was sufficient in both respects, and that being the case, the action taken at the convention was legal insofar as this case is concerned.

Now, to refer to the second cause of action, the second claim for relief in which the plaintiff seeks to challenge the check-off of the so-called emergency dues within the meaning of the Labor-Management Agreement, the second cause of action,

Paragraph 3, says that by doing so the parties were violative of the collective bargaining agreement.

Well, it appears that they allege also an unfair labor practice. At least the defendants contend that that is what they are doing, and it would seem from the *San Diego Building Trades* v *Garmon* that if an unfair labor practice is alleged, the courts should go slowly in interjecting themselves into the picture.

Certainly if this is a matter within the jurisdiction of the National Labor Relations Board, this Court should be very reluctant to plunge into it, and certainly also the National Labor Relations Board considered that the matter was within its jurisdiction. It denied the sought relief, not because it was outside the scope of its jurisdiction but because it concluded on the merits that it was not worthy of taking any part of it.

But assuming that this Court should act pursuant to 29 United States Code, Section 185, I can't help but be impressed with the point of view expressed in that letter of the National Labor Relations Board.

The amendment of Section 16 complained about at the convention simply provides for an increase in the union strike fund dues, and the documentation submitted by the defendants shows clearly that strike funds have long been part of the dues structure, and I can't help but think that in this instance, whether it is an assessment or whether it is a temporary dues increase comes in the area of semantics. It is an increase in dues for the purpose of obtaining a strike fund, and if it becomes an assessment simply because it is designed to endure not indefinitely, well, so much the better.

In any event, I have to conclude that in view of the history and in view of the wording of the amendment, and in view of the agreement between employer and union as to what the interpretation is, and in view of the interpretation by the National Labor Relations Board, and in view of what seems to the Court to be the only common sensible approach to which you can come, I have to conclude that the check-off of dues

under the amendment is just as valid as a check-off of dues before the amendment took place, and therefore I find no contract violation on the part of the employers or of the union in checking off the dues that were certified to be checked off as a result of the special convention.

Now, that would dispose also of the third cause of action, it seems to me, because, having found that there was no wrongful payment of money, we don't have to go into the third cause of action any further.

So summary judgment will be given for the defendant unions and for the companies. But rather than having to read all five of all six, whatever it is, in findings of fact and conclusions and separate orders, can't they all be combined into one, gentlemen? Wouldn't that be more feasible?

MR. LEVY: Yes.

THE COURT: All right. Let the defendants work out amoung themselves the text of findings of fact and conclusions and summary judgment in one document on behalf of all defendants.

Now, is there anything further?

I do recall that one of the defendants asked for attorney's fees in resisting this matter. Something came in very late. Is there any provision for that?

MR. RISTAU: There was an amended complaint and we have not answered. Our time has not expired, so I don't know how we can treat that.

MR. ARNOLD: I think we can dismiss the cross-claim.

THE COURT: All right, let that be dismissed — let the cross-claim be withdrawn, and summary judgment will be given.

Now, Mr. Brown, you have an appealable order if you so desire.

Anyting further, gentlemen?

Full Text of Written Order:

The motions for summary judgment of the defendants and the plaintiffs came on regularly to be heard on the 11th day of March, 1968, in the court room of the Honorable William P. Gray, United States District Court Judge presiding, moving defendants appearing by their attorneys set forth above on the title page; plaintiffs appearing by their attorneys set forth above on the title page; plaintiffs appearing by their attorneys, Hill, Farrer & Burrill, by Kyle Brown, and the moving defendants' Motions and the moving plaintiffs' Motion heard as Motions for Summary Judgment under Rule 56 of the Rules of Civil Procedure, and the court having considered the evidence presented, affidavits submitted and Points and Authorities filed by all of the parties and the matter having been submitted to the Court for decision and the Court having duly considered the cause, the Court now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

1. This action is brought by the plaintiffs pursuant to the terms and provisions of the Act of September 14, 1959, 73 Stat. 519, 29 USC, Section 153 et seq., commonly known as the hereinafter referred to as the "Landrum-Griffin Act," and Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 and Section 302(e) of the Taft-Hartley Act, 29 U.S.C. Section 186(e).

2. Each of the defendant Unions is a labor organization within the meaning of the provisions of the "Landrum-Griffin Act" representing employees in industry affecting commerce.

3. Jurisdiction of this Court is by virtue of the provisions of 29 USC, Section 412 and Section 301(e) of the Taft-Hartley Act, 29 U.S.C. Seciton 186(e).

4. Each of the defendant Local Unions and the International Union (UAW) has executed collective bargaining agreements with Employers in industry affecting commerce on behalf of the employees represented by said defendant Unions.

5. There are no material issues of fact raised by the Motions for Summary Judgment and affidavits attached thereto, and therefore this case is properly resolved by Summary Judgment.

6. The collective bargaining agreements between the defendant Unions and each of the defendant Employers named in this action are valid and presently in full force and effect. Each of said collective bargaining agreements contain provisions whereby the defendant Employers agree to deduct each month from the wages of employees covered by said agreements, who have executed authorization cards for the check off of dues, the regular periodic membership dues of the defendant Unions.

7. Until on or about October 1, 1967, the amount of uniform periodic minimum dues payable by the members of the defendant Unions that were deducted and remitted by the defendant Employers to the defendant Unions was the sum of Five Dollars ($5.00) per month.

8. On September 8, 1967, each Local Union of the International Union (UAW) and each of the defendant Local Unions to this action received written notice of a special convention to be held on October 8, 1967, in the City of Detroit, State of Michigan. Said notice adequately advised all of the Locals of the International Union (UAW) that the special convention would consider an increase in dues and a change of the dues structure under the International Constitution.

9. On or about October 8, 1967, the special convention of the International Union (UAW) was held in the City of Detroit, State of Michigan. At said special convention a majority of the delegates voting enacted a constitutional change in the Constitution of the International Union (UAW) which resulted in an increase of the regular and periodic dues of said labor organization. Said special convention met all of the requirements of the Labor Management Reporting and Disclosure Act of 1959, 61 Stat. 136, 29 USC 141 et seq.

10. The vote at the special convention amending the International Constitution (UAW) and increasing the regular and

periodic dues of said labor organization was lawful and complied with all of the statutory requirements contained in Section 101(a)(3), 29 U.S.C. Section 5411(a)(3), of the Labor Management Reporting and Disclosure Act of 1959 and with the provisions of the International Constitution (UAW).

11. It is true that the lawful minimum monthly dues of the International Union (UAW) and its affiliated Local Unions is in the sums fixed by Article 16 of the Constitution of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) as amended October 8, 1967.

12. The collective bargaining agreements between the defendant Unions and the defendant Companies contain provisions for final and binding arbitration of all grievances concerning the interpretation and application of the terms of the agreement. Said collective bargaining agreement contains comprehensive and detailed grievance procedures. None of the plaintiffs to this action have made any attempt or effort to utilize the grievance procedure of said collective bargaining agreement and there is no showing that it would have been futile to pursue such procedures.

13. The defendant Unions and the defendant Companies have for many years construed as dues within the meaning of the Union Security and Checkoff provisions of the collective bargaining agreements as including monies to be paid to the International Union's strike insurance fund, and it has been the intent of the parties that monies to be paid into the strike insurance fund were dues within the meaning of their collective bargaining agreements.

14. With respect to defendant UAW Local Union No. 887 and defendant North American Rockwell Corporation, there have been two arbitration decisions interpreting the term "dues" in the Union Security and Checkoff provisions of the collective bargaining agreement to include amounts to be paid

into the strike insurance fund of the International Union (UAW).

15. Defendants North American Rockwell Corporation and McDonnell Douglas Corporation are instructed by the terms of their collective bargaining agreements with defendants UAW, Local Unions No. 887 and No. 148 to deduct such dues as are certified to by the duly elected financial officers of the Locals or the International. The financial officers of said Local Unions or the International did certify to said Employers an amount of dues equivalent to the amount adopted at the special convention of October 8, 1967, and the amounts deducted by said Employers have been at all relevant times only amounts so certified.

16. On or about October 23, 1967, plaintiffs herein, Eugene Cole and Carol Jones filed with the National Labor Relations Board charges against UAW Local Unions Nos. 887 and 148, Case No. 31-CB-286, alleging that the imposition of the dues voted at the special convention of October 8, 1968, constituted an unfair labor practice. On or about November 20, 1967, the Regional Director for Region 31 of the National Labor Relations Board sent a letter to the charging parties in said Case No. 31-CB-286 stating that as a result of his investigation it was found that the dues increase voted at the special convention "did not constitute a 'special tax' or assessment, but constituted rather a permissible change in 'periodic dues' within the meaning of Section 8(a)(3) proviso". The refusal of the Regional Director to issue complaint was appealed by the charging parties to the General Counsel. On or about February 9, 1968, the General Counsel sent a letter to the charging parties denying the appeal for the reasons denying the appeal for the reasons set forth in the Regional Director's letters to the parties.

17. The increased dues voted at the special convention of October 8, 1967, constitute "membership dues" within the meaning of Section 302(c)(4) of the Labor-Management Rela-

tions Act as amended, 29 USC 186(c)(4). The deduction by the defendant Employers for the delivery to the defendant Unions of the sums adopted as Union membership dues by the October 8, 1967 special convention of the International Union (UAW) does not constitute an unlawful delivery of money and violation of the Labor-Management Relations Act, Section 302(a)(1), 29 USC 186(a)(1).

Conclusions of Law

From the foregoing Findings of Fact the Court finds as follows:

FIRST CLAIM FOR RELIEF:

1. That the United States District Court has jurisdiction of this action under the provisions of the Labor-Management Reporting and Disclosure Act of 1959, Section 101 et seq., 29 USC 401 et seq.

2. That the increase in periodic dues enacted by the special convention of the International Union, United Automobile, Aerospace and Agricultural Implement Workers Union (UAW) on October 8, 1967, was lawful and met all statutory requirements and has validly been in full force and effect and applicable to all Local Unions and all members of said International Union, United Automobile, Aerospace and Agricultural Implement Workers Union (UAW), and its affiliated Local Unions.

3. That the collection by the defendant Employers in this action by means of "dues checkoff" of said periodic dues as voted and enacted by said special convention on October 8, 1967 of said International Union, United Automobile, Aerospace and Agricultural Implement Workers Union (UAW) did not violate any of the provisions of the Labor Management Relations Act as amended, and particularly did not violate the provisions of Section 302(a)(1) of said Act.

4. That although the law does not require that the notice of the special convention contain the subject matter to be considered at the special convention, the notice of September 8, 1968, did adequately advise all Locals that the special convention would consider a dues increase.

5. That Section 101(a)(3)(B)(i) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 411 (a)(3)(B)(i), does not require a statement of the exact dues program to be voted on at the special convention.

6. That the defendants, and each of them, are entitled to a Summary Judgment against the plaintiffs herein on the First Claim For Relief.

SECOND CLAIM FOR RELIEF:

1. That plaintiffs herein, Eugene Cole and Carol Jones, filed with the National Labor Relations Board unfair labor practice charges alleging that the dues increase voted at the Special Convention constituted unfair labor practices, and that the National Labor Relations Board accept jurisdiction over said charges but refused to issue complaint on the grounds that the dues increase constituted lawful periodic dues within the meaning of the Labor-Management Relations Act of 1949, as amended.

2. That the National Labor Relations Board has exclusive jurisdiction over the alleged contract violation claim in plaintiffs' Second Claim For Relief and that this Court has no jurisdiction over the subject matter alleged by plaintiffs in their Second Claim For Relief.

3. That in the alternative, and as an independent Conclusion of Law, this Court must decline jurisdiction over the Second Claim For Relief because the plaintiffs did not pursue their contractual remedies afforded by the grievance and arbitration provisions of said collective bargaining agreements.

4. That even assuming, *arguendo*, that this Court should accept jurisdiction of the contract, violation claim under Section 301 of the Labor-Management Relations Act of 1949, as amended, 21 U.S.C. Section 185, the reasoning of the National

Labor Relations Board in finding that the dues increase voted at the Special Convention is persuasive and accordingly this Court finds that the said dues increase was lawful and that the dues deductions made pursuant thereto were not a violation of the collective bargaining agreements between the defendant Unions and the defendant Companies.

5. That the defendants and each of them are entitled to a Summary Judgment against the plaintiffs herein on the Second Claim For Relief.

THIRD CLAIM FOR RELIEF:

1. That the deduction by the defendant Employers of the increase in periodic dues enacted by the special convention of the International Union (UAW) on October 8, 1967, and payment of same to defendant Unions, was lawful and did not violate Section 302 of the labor Management Relations Act, as amended, 29 U.S.C. Section 186.

2. That the defendants and each of them are entitled to a Summary Judgment against the plaintiffs herein on the Third Claim For Relief.

THEREFORE, IT IS ORDERED that Summary Judgment be entered based on these Findings of Fact and Conclusions of Law in favor of the defendants herein and against the plaintiffs herein, and each of them. The defendants are awarded their costs of suit from plaintiffs.

STATE OF MICHIGAN
IN THE SUPREME COURT

A.G. BAKER, JR., et al.,
Plaintiffs-Appellants,

vs.

GENERAL MOTORS CORPORATION,
Defendant-Appellee,

and

MICHIGAN SECURITY COMMISSION,
Defendant-Appellee.

Calendar Nos. 59861, 59862, and 59863

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that A.G. Baker, Jr., et al., the appellants above-named, hereby appeal under 28 U.S.C. § 1257(2) to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, affirming the judgment of the Michigan Court of Appeals, entered in this action on January 17, 1985, and from the denial of Plaintiffs-Apellants' Motion for Rehearing entered in this action by the Supreme Court of the State of Michigan on April 23, 1985.

Respectfully submitted,

Fred Altshuler
Altshuler & Berzon
Suite 600
177 Post Street
San Francisco, CA 94108
(415) 421-7151

Jordan Rossen
(Counsel of Record)
Richard W. McHugh
Daniel W. Sherrick
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

By:
Jordan Rossen (P-19679)
And:
Daniel W. Sherrick
(P-37171)
Attorneys for Appellants

July 17, 1985

MOTION

No. 85-117

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

A.G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,
Appellants,

vs.

GENERAL MOTORS CORPORATION,
Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

J.R. WHEATLEY
ASSISTANT GENERAL COUNSEL
GENERAL MOTORS CORPORATION
3044 W. Grand Blvd.
Detroit, MI 48202
(313) 556-4021

FILDEW, HINKS, GILBRIDE,
MILLER & TODD
By: JONATHAN N. WAYMAN
3600 Penobscot Building
Detroit, MI 48226
(313) 961-9700

Counsel for Appellee
General Motors Corporation

TABLE OF CONTENTS

* Pursuant to Rule 28.1 of the Rules of the Court, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Appellee General Motors Corporation: Motor Enterprises, Inc. (partly owned by the U.S. Small Business Administration); GMFanuc Robotics Corp.; Colmotores, Bogota, Columbia; Isuzu Motors Limited, Tokyo, Japan; GM Allison Japan Limited, Tokyo, Japan; General Motors Kenya Limited, Nairobi, Kenya; Saehan Motor Company, Ltd., Seoul, Korea; General Motors Pilipinas, Inc., Manila, Philipines; Saudi American Machinery Maintenance Company, Ltd., Jeddah, Saudi Arabia; and Industria Delova Automobile, Kikinda, Yugoslavia.

TABLE OF CONTENTS—(Cont'd)

TABLE OF CONTENTS—(Cont'd)

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES—(Cont'd)

INTRODUCTION

The appeal, that compells the following Motion to Dismiss, is the third federal pre-emption attack on a state unemployment insurance law as it is applied to those involved in a labor dispute.

The first case involved a claim by an employee that the state unemployment insurance law that disqualified him from receipt of unemployment compensation, because he worked in the same "establishment" as those on strike, was pre-empted by the Social Security Act. This Court held that such a state statute was not pre-empted.

The second case involved a law that allowed unemployment compensation payments to be made to strikers. An employer claimed that such a law conflicted with the NLRA and therefore was pre-empted. This Court, however, determined that Congress intended that the states were free to either authorize or prohibit such payments.

This appeal is brought by employees who were disqualified from receipt of unemployment compensation because they helped finance strikes that caused their unemployment. They claim, as did the employer in the second case, that the state law violates federal labor policy and is therefore pre-empted.

In anticipation of the expiration of the auto contracts in 1967, the UAW increased members' regular union dues, funneling a large percentage of the increase into the union strike fund. Thereafter, three strikes took place at plants functionally integrated with the Appellants' plants. Unable to continue production, the Appellants were sent home. They applied for unemployment insurance but were disqualified from receipt of benefits for the reason that they had helped finance the strike that caused their unemployment by the payment of specially increased dues.

The Appellants' claims of conflict are largely hypothetical and rely on imprecise application of prior decisions

of this Court in an effort to create an issue not heretofore decided. This Court, however, has already reviewed the Congressional Record, the Social Security Act and the National Labor Relations Act and decided that Congress intended that states be free to authorize or prohibit such payments.

Even if congressional intent had not been decided, the factual underpinnings of the case are such that it does not lend itself to advancing the existing body of federal pre-emption law.

MOTION TO DISMISS

General Motors Corporation moves that this Court dismiss the captioned appeal for the following reasons:

I. FAILURE TO FOLLOW SUPREME COURT RULES

APPELLANTS' JURISDICTIONAL STATEMENT FAILS TO IDENTIFY AT WHAT STAGE OF THE PROCEEDINGS THE QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED, AS REQUIRED BY SUPREME COURT RULES 16.1(a) and 15.1(g)

APPELLANTS' JURISDICTIONAL STATEMENT PRESENTS THE ISSUE IN AN ARGUMENTATIVE FASHION CONTRARY TO SUPREME COURT RULES 16.1(a) and 15.1(a)

Appellants' Jurisdictional Statement does not identify at what stage of the proceedings the questions sought to be reviewed were raised as required by Supreme Court Rule 15.1(g). The Michigan Supreme Court observed (Jurisdictional Statement, p. 96a) that the pre-emption issues were not raised at the first hearing level, the Michigan Employment Security Referee Hearings; they were not raised at the second hearing level, the Michigan Employment Security Appeal Board; only fleetingly noted in the circuit courts, and not extensively briefed in the Court of Appeals. Except for a terse conclusory statement of one of three State Circuit Judges, none of these tribunals addressed these issues.

The issue of 'impermissible intrusion on the primary jurisdiction of the NLRB' was not raised in the courts below nor addressed by the Michigan Supreme Court. See Jurisdictional Statement, pp. 51a-69a. Even if the question had been presented, it does not state a substantial question. See section V.

The issue presented is argumentative and implies disqualification because a union member paid "regular" union dues. Payment of regular dues do not lead to disqualification in Michigan. The fact is that those disqualified paid "non-regular", substantially increased union dues that were increased specifically to finance strikes, some of which caused their unemployment.

The Jurisdictional Statement, therefore does not comply with Rules 15.1(a) and 15.1(g) and should be dismissed pursuant to Rule 16.1(a).

II. NO CASE OR CONTROVERSY

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE APPEAL BECAUSE THERE IS NO CASE OR CONTROVERSY. THE APPELLANTS DID NOT INTRODUCE EVIDENCE BELOW THAT ANY OF THEM WERE TERMINATED, THREATENED TO BE TERMINATED, OR THAT THEIR UNION'S DECISION MAKING PROCESS WAS IN ANY WAY AFFECTED BY THE GRANT OR DENIAL OF UNEMPLOYMENT INSURANCE. IT IS PURELY HYPOTHETICAL ARGUMENT.

Article III of the Constitution requires that there be a case or controversy in order for this Court to take jurisdiction, U.S. Const., Art. III, §2. Very simply, there is not.

The gravamen of Appellants' position, the factual underpinnings upon which their entire case is built, is that disqualification from unemployment insurance benefits,

because they helped finance the strike that caused their unemployment, in some way inhibits union members from financially assisting their union.

The facts, however, and therefore the controversy, are totally absent. The Appellants failed to produce any evidence that any of the Appellants were fired, removed from the union, threatened with either, or that their union's decision making was affected in any way by the grant or denial of benefits. In fact, *none* of the Appellants testified. The only sanction threatened by the union was ineligibility for strike benefits.

Early in the record the Appellants stipulated that all the Appellants paid emergency dues (107a). Years later, in response to the argument that members were deterred from financially assisting their union, the Appellants were asked who, among their group, failed to pay the emergency dues. After an exchange of correspondence between the parties requesting the information, the UAW witness called to testify on the subject indicated that if dues were not paid, the Appellants, "would not have been entitled to strike benefits under any circumstances until they had paid the money, the dues money, plus their reinstatement fee. . . ." (27a).[1] The Appellants failed to produce any direct or circumstantial evidence of any effort to have any member fired. The best they came up with was that they *could* have been. The only threat that was conveyed to union members was that which was set forth in flyers distributed at various plants introduced as exhibits in the record below (110b):[2] in eligibility for strike benefits.

Conspicuous by its absence is any showing that any union member was in fact threatened with termination if the "emergency dues" were not paid. (76b)[3]

---

[1] (a) is a reference to the Appellants' State Supreme Court Appendix; (b) is a reference to Appellee's State Supreme Court Appendix.

[2] Ibid.

[3] Ibid.

At the June 23, 1981 remand hearing before the MESC, one of several hearings that resulted from the Michigan Supreme Court's remand, the question was further addressed. The transcript of the hearing omitted from the Appellants' State Supreme Court Appendix provides, beginning at page 92:

> "We ask Mr. Rossen if he would be kind enough to identify those people, those claimants in the 1967/68 labor dispute who in fact refused to pay emergency dues."
>
> * * *
>
> "Mr. Rossen: . . . *He keeps asking me whether I will agree to waive a certain argument in my brief. I am not going to give him that.*"
>
> "Mr. Wayman: If you refuse to waive the argument, then I have to have the information. . . ." (Emphasis added)

The dialogue between the Board of Review and counsel continued through page 105 of the transcript. Board member Gravelle then said at 105:

> "Just assuming for the sake of argument that the issue of whether each of the claimants made the dues contributions in question were still open, Mr. Rossen, *I would invite you to submit an offer of proof as to the names of any of the claimants you represent who in fact did not make the dues contribution at issue*. If the claimant in fact did not make the dues contribution at issue, then he would not have financed the labor dispute. That would be information and be an offer of proof that I would be interested in seeing."
>
> Mr. Rossen: "*We are not going to make an offer of proof. . . .*" (Emphasis added)

The fact finder concluded:

> *"There is nothing in the record to indicate that any claimants were subject to discharge from employment or*

ouster from the union for failure to pay dues." See Jurisdictional Statement, p. 107a. (Emphasis added.)

With the focus on the absence of factual support for the claim of conflict, a reading or re-reading of the state court's findings of fact concerning the overwhelmingly successful dues collection and the resultant strike fund (Jurisdicitonal Statement, pp. 101a-113a) punctuates the absence of facts necessary to support the hypothetical argument. Without facts, there is no justiciable controversy:

> "A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be *definite and concrete,* touching the legal relations of parties having adverse legal interests. It must be a *real and substantial* controversy admitting of specific relief through a degree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 240-241 (1937), (citations omitted, emphasis added). See also *Wheeler v. Barrera,* 417 U.S. 402, 426 (1974).

Appellants, and members of their class, simply were not fired nor were they deterred from paying "financing dues".

III. CONGRESSIONAL INTENT HAS ALREADY BEEN DETERMINED

APPELLANTS FAIL TO PRESENT A SUBSTANTIAL FEDERAL PRE-EMPTION QUESTION FOR THE REASON THAT THIS COURT HAS ALREADY DETERMINED THAT CONGRESS, WHEN CONSIDERING THE SOCIAL SECURITY ACT AND THE NLRA, DECIDED THAT THE STATES BE FREE TO AUTHORIZE OR PROHIBIT UNEMPLOYMENT COMPENSATION PAYMENTS TO THOSE INVOLVED IN A LABOR DISPUTE, REGARDLESS OF ITS APPARENT IMPACT ON FEDERAL LABOR POLICY

FURTHER, CONGRESSIONAL INTENT HAVING BEEN DETERMINED, THERE IS NO REASON TO EMBRACE PRE-EMPTION DISTINCTIONS

The Supreme Court, pursuant to 28 USC §1257, has authority to review only state court judgments that are final and turn upon a substantial federal question.

A federal question is not substantial where it has been settled by prior Supreme Court decisions. In *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902) the Court stated:

> "[I]t is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not merely formal Federal question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a Motion to Dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivilous, *or has been so explicitly foreclosed by decision or decisions of this Court as to leave no room for real controversy,* the Motion to Dismiss will prevail." (Emphasis added.)

It appears that several Supreme Court pre-emption decisions have determined the question raised by the Appellants.

In *Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471 (1977), this Court determined congressional intent on the question of claimed federal pre-emption of state unemployment insurance law by the Social Security Act. This Court found no pre-emption, stating that Congress intended to grant states broad freedom in setting up their unemployment systems.

Mr. Hodory worked for United States Steel as an apprentice millwright in Youngstown, Ohio. In 1974 U.S. Steel coal mine employees went on strike. When fuel became scarce the mills were shut down and the employees sent home. Mr. Hodory was one of them. When he filed for unemployment compensation he was disqualified because he worked in the same "establishment" as the miners.

On an appeal Hodory claimed that the state statute was pre-empted by the Social Security Act, a tax statute and was violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Mr. Hodory cited one page of legislative history of the Social Security Act that provided that those "involuntarily" unemployed should receive unemployment compensation. This Court examined legislative history generally, however, and concluded to the contrary:

> "*The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish.* We believe that all matters in which uniformity is not absolutely essential should be left to the States. The Federal Government, however, should assist the States in setting up their administrations and in the solution of the problems they will encounter." 431 U.S. at 483.

> "Appellee's claim of support in the legislative history accordingly fails. Indeed, that history shows, rather, that *Congress did not intend to restrict the ability of the States to legislate with respect to persons in appellee's position.* See also HR Rep No. 615, 74th Cong, 1st Sess, 8-9 (1935), S Rep No. 628, 74th Cong, 1st Sess, 12-13 (1935)" 431 U.S. at 484.

It is important to note that the "Appellee's position", Mr. Hodory's involvement in the labor dispute that caused his unemployment, was nothing more than working in a plant functionally integrated with the mines on strike.[4]

> *Indeed, study of the various provisions cited shows that when Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms.* There are numerous examples, in addition to the one set forth in n. 16, less related to labor disputes but showing congressional ability to deal with specific aspects of state plans. *The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.*" 431 U.S. at 489 (Emphasis added).

Concerning conflict with the NLRA the Court made it clear that it did not visit the issue:

> "3. At no point in this legislation has appellee claimed that [the statute] conflicts with or is pre-empted by any provision of the National Labor Relations Act . . . . We

[4] The Court quoted §5(d) of draft bills in footnote 13 of the Opinion. The draft bills included a financing disqualification provision. 'Those unemployed due to a stoppage of work that exists because of a labor dispute would be disqualified unless':

> "1. He is not participating in or *financing* or directly interested in the labor dispute which caused the stoppage of work. . . ."

do not today consider or decide the relationship between the Act and a statute such as [Ohio's]." 431 U.S. at 475 n. 3.

Two years later, however, this Court examined a claimed conflict between the NLRA and a state unemployment insurance statute that paid unemployment compensation to strikers finding no pre-emption; Congress had decided to tolerate any interference with federal labor policy caused by a state's unemployment insurance statute.

In *New York Telephone Company v. New York Department of Labor,* 440 U.S. 519 (1979), the District Court found that payment of unemployment compensation to strikers:

"[I]s a substantial factor in the workers decision to remain on strike, and that . . . it had a measurable impact on the progress of the strike. 440 U.S. at 525-526.

From the foregoing, the District Court concluded that the state statute conflicted with federal labor law.

On Appeal to the Supreme Court, three Justices agreed that the payment of benefits to strikers had a substantial impact:

". . . I regard it as a fundamental truism that the availability to, or expectation or receipt of a substantial weekly tax-free payment of money by, a striker is a substantial factor affecting his willingness to go on strike, to remain on strike, in pursuit of desired goals." 440 U.S. at 526 n. 5.

The underlying assumption of *New York Telephone* has major significance to this case. It is clear from the foregoing that the underlying assumption is that the payment of unemployment compensation to those involved in a labor dispute, that causes their unemployment, is contrary to the intent of Congress to avoid industrial strife and to promote the full flow of commerce.[5]

[5] 29 USC §151.

Hodory and *New York Telephone*, therefore, establish the scope of state freedom envisioned by Congress, to disqualify those involved in a labor dispute. On one end, those who find themselves as minimally involved as Mr. Hodory, and at the other end, those actually on strike as in *New York Telephone*. Mr. Baker, one who helped finance that strike that caused his unemployment, finds himself somewhere in between.

It is the combination of the *Hodory* and *New York Telephone* that should fairly lead this Court to the conclusion that Congress intended to tolerate any alleged conflict, assuming, of course, there is one in the first instance.

With the underlying assumption that payment of unemployment insurance benefits to strikers upsets the balance envisioned by Congress, at first blush it appeared that the New York statute and federal labor law were two highballing locomotives bearing down on each other on the same track. After close examination of Congressional intent, however, six Justices concluded:

"That the states be free to authorize or prohibit such payments." 440 U.S. at 554.

The concurring opinion of Justice Blackmun (Marshall, J., joining) focused on the *legal issue* that divided the six Justice majority of the Court:

". . . In the present case, the plurality appears to be saying that there is no pre-emption unless 'compelling Congressional direction' indicates otherwise. The premise is therefore one of assumed priority on the state side. In *Machinists*, on the other hand, the Court said, I thought, that there is preemption unless there is evidence of congressional intent to tolerate the state practice. That premise, therefore, is one of assumed priority on the federal side." 440 U.S. at 549.

Justice Blackmun then bypassed the presumption problem and went directly to the ultimate issue of congressional intent:

"Despite the distinction, however, *either approach leads to the same result* in the present case. The evidence cited in Part III of the plurality's opinion establishes that *Congress has decided to tolerate any interference caused by an unemployment compensation statute such as New York's.*" (emphasis added) 440 U.S. at 549.

Justice Stevens wrote Part III of the Opinion, to which Justice Blackmun (and Marshall) referred, and Justices White and Rehnquist concurred. Justice Brennan agreed but concluded that since congressional intent had already been determined, it was inappropriate that the Court reach an unnecessary issue by further obfuscating the field of labor pre-emption by embracing the distinction adopted in the plurality opinion. The majority, therefore, *upheld* the lower court finding that Congress had decided to *tolerate the imbalance* created in the collective bargaining relationship by the payment of unemployment compensation to strikers (thereby avoiding federal pre-emption).

Justice Stevens examined the question of what Congress intended by the passage of the NLRA as it affected the various states' right to control the payment of unemployment insurance benefits in a labor dispute situation. In his thoroughly footnoted opinion, Justice Stevens concluded:

"Subsequent events confirm our conclusion *that the congressional silence in 1935 was not evidence of an intent to pre-empt the States' power to make this policy choice*. On several occasions since the 1930's Congress has expressly addressed the question of paying benefits to strikers, and especially *the effect of such payments on federal labor policy.* On none of these occasions has it suggested that such payments were already prohibited by an implicit federal rule of law. Nor, on any of these occasions has it been willing to supply the prohibition. *The fact that the problem has been discussed so often supports the inference that Congress was well aware of the issue when the Wagner Act was passed in 1935, and*

that it chose, as it has done since, to leave this aspect of unemployment compensation eligibility to the States. [Footnote omitted].

* * *

". . . in an area in which Congress has decided to tolerate a substantial measure of diversity the fact that the implementation of this general state policy affects the relative strength of the antagonists in a bargaining dispute is not a sufficient reason for concluding that Congress intended to pre-empt that exercise of state power." (Emphasis added) 440 U.S. at 544-546, n. 44.

On the way to reaching the foregoing conclusion, Justice Stevens also noted:

"Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or prohibit, such payments." 440 U.S. at 544 (Emphasis added)

New York Telephone was an employer's pre-emption attack on the state statute granting unemployment insurance to strikers. Organized labor, including the UAW (Appellants' agent here), appeared as *Amici Curiae* before the United States Court of Appeals for the Second Circuit. The following is the position taken in *New York Telephone*:

"The availability of unemployment insurance benefits to strikers *is an, at most, peripheral concern to the LMRA. The LMRA does not by its terms, of course, apply in any fashion to unemployment benefits.* Indeed, Congress has created an entirely separate statutory scheme in which Congress has clearly permitted states to adopt and maintain such policy."

* * *

> *". . . [T]he challenged state statute permitting delayed payment of unemployment insurance benefits to unemployed strikers is completely unrelated to any activity regulated or prohibited in §7 or §8 of the NLRA."*[6]

A position exactly opposite from the position taken here.

With Appellants finding themselves somewhere between the minimal involvement of Mr. Hodory and the substantial involvement of those who struck the New York Telephone Company, the finding that Congress did not intend to pre-empt either claimant in those instances applies equally to the Appellants here.

More recently this Court examined the question of whether a state statute, that *regulated* who could and could not be an elected union official, was pre-empted by §7 of the NLRA that guarantees to employees various rights, among them: "To bargain collectively through representatives of their own choosing." 29 USC §157. The case is important because the Appellants here rely on §7 in support of the claim that Michigan's unemployment law is pre-empted. The case is *Brown v. Hotel and Restaurant Employees and Bartenders International Union, Local 54*, 104 S. Ct. 3179 (1984).

Brown addresses an apparent actual conflict between a state law that regulates[7] who can and cannot be a union official, and a union member's claimed "unfettered" section 7 right to "bargain collectively with representatives of their own choosing."

---

[6] Brief of Amici Curiae. "This Brief is submitted on behalf of the following labor organizations as Amici Curiae . . .: Local 259, International Union, United Automobile Aerospace and Agricultural Implement Workers of America . . . ."

[7] Appellants place great weight, and argue repeatedly that the complained of unemployment compensation statute is a regulation in an effort to fit their case into the rationale of regulatory cases. A typical example is *Brown* where a state prohibited unions from being run by people with a criminal record. Unemployment insurance statutes do not, however, regulate. See *New York Telephone*, 440 U.S. at 528, 529, 532 and 546.

New Jersey decided to allow gambling in the state. In an attempt to exclude organized crime, the state passed a statute that regulated unions representing gaming industry employees. The Act imposed disqualification criteria on union officials (e.g. no felons). It was claimed that the state statute was pre-empted by the NLRA, specifically §7 that reads:

> *"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."*

The lower court found there was an *actual conflict* between state and federal law. That court concluded that federal law pre-empted the state law because it, "*precludes* casino industry employees from selecting as union officials individuals who do not meet the . . . qualification criteria." 104 S. Ct. at 3187 (Emphasis added).

Prior to analyzing the case Justice O'Connor summarized the categories that resulted in presumption of congressional intent to pre-empt state law. Paraphrasing *Brown:*

1. Congress has *explicitly mandated* the pre-emption of state law;
2. Congress has adequately indicated an *intent to occupy the field of regulation;*
3. Congress intended to displace state law to the extent that it *actually conflicts* with federal law; the test being, "compliance with both federal law and state regulations is a physical impossibility";
4. State law stands as an *obstacle to the accomplishment and execution of the full purposes and objectives of Congress;*
5. *NLRB* primary jurisdiction; the *interpretation and application of* this body of *labor law* by the NLRB;

except where deepy rooted local interests are at stake. 104 S. Ct. 3186-3187.

Justice O'Connor summarily dismissed the application of paragraphs 1 and 2 above to a §7 analysis:

"Section 7 of the NLRA, 29 USC §157, the provision involved in this case, *neither contains explicit pre-emptive language nor otherwise indicates a congressional intent to usurp the entire field* of labor-management relations." citing *New York Telephone, supra.* (Emphasis added) 104 S. Ct. at 3186

In addition, the Court dismissed the claim that the state regulation invaded the primary jurisdiction[8] of the NLRB by concluding:

"If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right." 104 S. Ct. at 3187.

The Court then proceeded to determine congressional intent by examination of the Labor Management Relations Act, passed after the NLRA, that dealt with restrictions on an employee's right to choose a representative. Congressional hearings were reviewed and the Court observed:

"More stringent state *regulation* of the qualifications of union officials was *not incompatible with national labor policies* as embodied in §7. (Emphasis added, footnote omitted). 104 S. Ct. at 3190.

Justice O'Connor then concluded:

"In the absence of more specific congressional intent to the contrary, we therefore conclude that New Jersey's regulation of the qualifications of casino industry union

[8] The Primary Jurisdiction issue was raised for the first time in the Jurisdictional Statement and should not be considered. See section I of this Brief. Assuming it is considered it does not present a substantial federal question. See section V of this Brief.

officials does not actually conflict with §7 and so is not pre-empted by the NLRA." 104 S. Ct. at 3190.

Applying *Brown* to this case, the Court has already made an in-depth analysis of congressional intent and decided, in *New York Telephone* and *Hodory,* to tolerate state unemployment statutes that authorize or prohibit the payment of unemployment compensation to those involved in a strike that causes their unemployment.

Brown, therefore, is another case that supports the conclusion that Appellants have not presented a substantial federal pre-emption question.

Finally, in *New York Telephone,* this court determined congressional intent, not by fitting the case into one of the pre-emption analysis rules, but by examining legislative history. Because of this, Justice Brennan concluded that the matter really was not appropriate to embrace pre-emption analysis distinctions:

"However, since I agree with my Brother Blackmun's conclusion that the legislative history of the NLRA and the Social Security Act reviewed in my Brother Steven's opinion provides sufficient evidence of congressional intent to decide this case without relying on those distinctions, I see no reason at this time either to embrace the distinctions or to deny that they may have relevance to pre-emption analysis in other cases." 440 U.S. 546-547.

With Justice Brennan observing that the *New York Telephone* matter was not an appropriate basis for determining a rule with regard to pre-emption analysis, the decision in *New York Telephone*, and subsequently *Brown,* make the question much less appropriate for review.

IV. ANALYSIS OF *NASH* IN LIGHT OF *HODORY, NEW YORK TELEPHONE* AND *BROWN*

APPELLANTS FAIL TO PRESENT A SUBSTANTIAL FEDERAL PRE-EMPTION QUESTION BASED ON *NASH* FOR THE REASON THAT THIS COURT'S PRE-EMPTION ANALYSIS IN *NASH* IS CONSISTENT WITH *HODORY, NEW YORK TELEPHONE* AND *BROWN*

With congressional intent having already been determined in *Hodory* and *New York Telephone*, questions concerning the tests by which congressional intent are determined become, if not irrelevant, certainly not ripe for review. However, since the Appellants have tried to *create* the pre-emption issue by attempting to fit their case into a category of analysis that, on its face, would compel pre-emption, their claims are addressed.

The Appellants rely heavily on *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967) in support of their claim of pre-emption. They wish to shoehorn this and the *Nash* case into the "actual conflict" category of pre-emption analysis, *viz.* a state regulation that actually conflicts with rights protected by federal law. The cases simply do not fit.

Mrs. Nash was laid off. She filed for unemployment compensation and filed an unfair labor practice charge against her employer for laying her off, claiming that the layoff was not because of lack of work, but because of her union activities. Florida concluded that the *filing of the charge alone* was a disqualifying labor dispute so terminated benefits. This Court, however, concluded:

> "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. This is shown by its adoption of §8(a)(4) that makes it an unfair labor practice for an employer to discriminate against an employee because he has filed charges." 389 U.S. at 238.

The Court observed that the denial of unemployment compensation:

> " . . . *has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board*. Florida has applied its unemployment compensation law so that an employee who believes he has been wrongfully discharged has two choices: (1) he may keep quiet and receive unemployment compensation until he finds a new job or (2) he may file an unfair labor practice charge, thus under Florida procedure surrendering his right to unemployment compensation and *risk financial ruin*, if the litigation is protracted. 389 U.S. at 239 (Emphasis added).

In the instant matter, Mr. Baker and members of his class were disqualified from receiving unemployment compensation because they helped finance, by the payment of specially increased union dues, the strike that caused their unemployment.

Brown sets forth the test that determines whether or not there is an actual conflict:

> "Compliance with both federal and state regulations [9] is a physical impossibility." 104 S. Ct. at 3186.

Was it impossible for Mrs. Nash to file an unfair labor practice charge? No. Was it impossible for Mr. Baker to financially assist his union's strike effort? No.

The issue, therefore, isn't whether there is an "actual conflict" between the claimed state regulation and federal law, but whether the state regulation, "is an obstacle to the accomplishment and execution of the full purposes of Congress." 104 S. Ct. at 3186. The fourth *Brown* category[10] and the category utilized in *New York Telephone*[11].

---

[9] See note 7.

[10] See page 15 of this Brief.

[11] Justice Blackmun setting the standard applied by five Justices observed:

(Footnote 11 continued on page 20.)

In Mrs. Nash's case the full purpose and objective of Congress was that she be "completely free" to file such a charge. The potential for "financial ruin" obviously stood in the way.

In Mr. Baker's case, did Congress intend that his right to financially assist his union under §7 be as unfettered as his right to file an unfair labor practice charge? Further, was he faced with the spector of financial ruin? In both cases the answer is, no.

First, that which deters industrial strife and promotes the full flow of commerce, within the confines of the NLRA, is consistent with the LMRA's policy and by no means is an "obstacle to the accomplishment and execution of the full purposes of Congress."[12]

(Footnote 11 continued from page 19)

"The crucial inquiry is whether the exercise of state authority 'frustrate(s) effective implementation of the Act's purposes.' " 440 U.S. at 556

Also see *Scofield v. NLRB*, 394 U.S. 423 (1968):

"In both *Skura* and *Marine Workers*, the Board was concerned with union rules requiring a member to exhaust union remedies before filing an unfair labor practice charge with the Board. That rule, in the Board's view, *frustrated the enforcement scheme* established by the statute and the union would commit an unfair labor practice by fining or expelling members who violated the rule.

"The *Marine Workers* case came here and the result reached by the Board was sustained, the Court agreeing that the rule in question was contrary to the plain policy of the Act to *keep employees completely free from coercion against making complaints to the Board. Frustration of this policy was beyond the legitimate interest of the labor organization*, at least where the member's complaint concerned conduct of the employer as well as the union. (Emphasis added, footnotes omitted.) 394 U.S. at 430."

[12] Analyzing the LMRA, as this Court did in *Brown*, §1(b) provides:

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities can be avoided or substantially minimized. . . . * * * It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers. . . ."

Secondly, unlike *Nash*, there is no threat of financial ruin. Disqualification from receipt of unemployment compensation results in the union substituting payment of strike benefits to the disqualified individual. It was established on the record below that those disqualified were in line to receive "loaned" strike benefits, layoff loans, as they are called by the Appellants' union, repayment of which was contingent on receipt of unemployment compensation. Invalidation of this state law, therefore would shift the support obligation from the strike fund to the unemployment insurance fund.[13]

The payment of strike benefits, when coupled with the relatively short duration of labor disputes, hardly raises the spector of potential financial ruin. Therefore, there is no "direct tendency to frustrate" the claimed right to be completely free to financially assist a union.[14]

At this point we are brought full circle to the question of what Congress intended, and that has been decided by *New York Telephone*. A majority of this Court concluded, consistent with the pre-emption analysis in *Nash*, and *Brown*, that in the context of unemployment insurance benefits, Congress intended to tolerate any apparent conflict with federal labor policy.

[13] *See* State Supreme Court Appendix at 39a, 40a, 61a, 63a, 64a, 74a and 75a.

[14] The conclusion that disqualification from receipt of unemployment insurance benefits does not deter a member in assisting or participating in the union is supported by a treatise written in 1975.

State unemployment insurance statutes, compelled by the Social Security Act in 1935, are patterned after English unemployment insurance statutes. In his treatise entitled, "Labor Disputes and Unemployment Insurance Benefits in Canada and England" (CCH Canadian Ltd. 1975), M.A. Hickling concluded at 215:

"There is no evidence that the disqualification from unemployment insurance benefit has had much effect on the degree to which members participate in the affairs of unions."

V. PRIMARY JURISDICTION

APPELLANTS FAIL TO STATE A SUBSTANTIAL FEDERAL PRE-EMPTION QUESTION BECAUSE THE SAME CONTROVERSY IS NOT PRESENTED TO THE NLRB AND THE STATE COURT

The Appellants' assertion that the state statute invades NLRB primary jurisdiction does not present a substantial question because it is raised for the first time in the Jurisdictional Statement and further because the jurisdictional line has already been drawn by this Court.

This Court's opinion in *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978) forecloses Appellants' argument that the jurisdiction of the NLRB pre-empts a state unemployment insurance law that disqualifies an individual from receiving unemployment compensation because he helped finance the strike that caused his unemployment.

Sears discusses pre-emption based on primary jurisdiction of the NLRB, where state law affects activity that is arguably protected or arguably prohibited, and sets forth the test for pre-emption in either case.

Where the activity affected by state regulation is arguably prohibited by the NLRA, the test to determine the scope of the pre-emption is;

> ". . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board." 436 U.S. at 197.

If the activity is arguably protected by the NLRA, *Sears* applies a threefold test. Paraphrasing:

1. The same controversies must be presented to the NLRB and the state court;

2. The aggreived party must have a reasonable opportunity to either invoke the Board's jurisdiction himself, or to induce his adversary to do so; and

3. There must be no frustration of National Labor Policy by the exercise of state court jurisdiction. See 436 U.S. at 201-203.

Appellants argue that the inquiry by the Michigan Employment Security Commission (MESC) is identical to an unfair labor practice charge alleging violations of §8(a)(3) or §8(b)(2). Actually the inquiries are quite different. The Appellants' argument uses jumbled terms and alleges confusing facts, so some clarification is required.

The Michigan Supreme Court in *Baker v. General Motors*, 409 Mich 639, 297 N.W. 2d 387 (1980) upheld the lower court's finding that the "emergency dues" schedule adopted by the UAW was "extraordinary." This finding was necessary because the Michigan Employment Security Act[15] (MESA) does not disqualify one who pays regular dues even though the dues are used to finance a labor dispute. The state courts made no finding that the dues were a "special assessment" and specifically refused to find that "regular" under the MESA is equivalent to "periodic" under the NLRA.[16]

The NLRB, on the other hand, when construing §8(a)(3) and §8(b)(2) is required to determine whether a union has attempted to cause discrimination or an employer has discriminated against an employee with regard to his employment based on union membership where membership has been denied or terminated for reasons other than a failure to pay "periodic dues and initiation fees uniformly required. . . ."[17]

---

[15] Mich. Compiled Laws §421.29(8) (1970)

[16] Appellants claim that the Michigan Supreme Court determined that the dues schedule was a "special assessment". See Jurisdictional Statement, p. 23, which is a term and concept never used by the Michigan Supreme Court.

[17] It was specifically determined below that none of the Appellants were subject to discharge by the employer. Further, none of the Appellants were discriminated against by their union. The Appellants' assertions, therefore, do not present a justiciable controversy. See Section II of this Brief.

Distinctions between the inquiry pursuant to the state unemployment insurance act and the controversy presented to the NLRB seem clear. The NLRB does not look to the purposes or amounts of any dues increase but only looks to whether the dues are periodic and uniformly required. The purpose of the state inquiry, on the other hand, is to determine whether the employees are financing a labor dispute that causes their unemployment by the payment of non-regular dues (*albeit* uniformly required) adopted for the purpose of financing a labor dispute.

The difference in inquiries engaged in by the state and the NLRB brings this case directly within the purvue of *Sears*, and *Belknap v. Hale*, 463 U.S. 491 (1983). In both cases this Court found that a state inquiry was different from an NLRB inquiry so state action was not pre-empted.

In *Sears*, a union was engaged in picketing. The state court in California issued an injunction requiring the union to remove its pickets from property belonging to Sears. Because the state court did not address the nature of the picketing or its protected or prohibited status under the NLRA, but only addressed state trespass law as it pertained to the placement of pickets, the state inquiry was different from the NLRB inquiry so there was no pre-emption.

Similarly, in the instant case, the state courts did not determine whether the union or an employer committed an unfair labor practice, but only determined that monies paid into a union strike fund were so connected with the labor dispute causing unemployment that unemployment compensation should be denied to those financing the dispute.

In *Belknap*, the court refused to find pre-emption of a state cause of action for misrepresentation and breach of contract where the state court determined the rights under state law of a group of laid off strike replacement workers. The state law rights of laid off workers were not subject to NLRB inquiry, so the state court's action was not pre-empted.

Appellants mistakenly rely on *Local 926, International Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983). Jones filed an unfair labor practice charge against the union claiming that it violated §8(b) of the NLRA by compelling Jones' employer to terminate him. The regional director refused to issue a complaint and Jones, instead of appealing to the general counsel, filed a complaint in state court for wrongful interference with contract. This Court found pre-emption because the crucial element of both claims was the same: A labor organization's attempt to cause an employer to discriminate against the employee.

Here, the state inquiry is whether employees financed the labor dispute causing their unemployment, regardless of whether the dues used to finance the dispute were periodic and uniformly required. There is no similarity between the factual findings made by the MESC and the NLRB.

Finally, even if there were a conflict, this matter would fall into the exception that where the conduct at issue is only a peripheral concern of the NLRA and further deeply rooted in local feeling or responsibility there is no pre-emption. See *International Association of Machinists v. Gonzales*, 356 U.S. 617 (1958) and *United Automobile Workers v. Russell*, 356 U.S. 634 (1958). As established by *Hodory* and *New York Telephone*, it is Congress's intent to tolerate any interference with federal labor policy by the payment or denial of unemployment insurance to those involved in labor disputes.

VI. INTERNAL AFFAIRS OF UNIONS

APPELLANTS FAIL TO PRESENT A SUBSTANTIAL FEDERAL PRE-EMPTION QUESTION FOR THE REASON THAT THIS COURT HAS ALREADY DECIDED TO ALLOW STATES TO BECOME INVOLVED IN THE INTERNAL AFFAIRS OF UNIONS

The Appellants assert that the state statute regulates their union's internal affairs. As shown earlier in this Brief, there is no regulation, though the payment or denial of unemployment insurance may very well be taken into consideration in determining strike strategy.

NLRB v. Boeing Co., 412 U.S. 67 (1973), is instructive. Striking employees of Boeing broke picket lines and returned to work. Some workers had resigned from the union prior to returning to work, some resigned shortly afterwards, and some never resigned. The union imposed fines against all the employees. The company brought an unfair labor practice charge against the union challenging the reasonableness of the union dues. The NLRB found that the validity of the dues did not depend on their amount. The D.C. Circuit remanded, finding that unreasonable fees could be coercive so constituted an unfair labor practice under §8(b)(1)(A). The Supreme Court granted Certiorari and reversed.

This Court stated:

> "Inquiry by the Board into the multiplicity of factors that the parties and the Court of Appeals correctly thought to have a bearing on the issue of reasonableness would necessarily lead the Board to a substantial involvement in strictly internal union affairs. While the line may not always be clear between matters that are internal and those that are external, to the extent the Board is required to examine into such questions as a union's motivation into imposing a fine, it would be delving into internal union affairs in a manner which we have previously held Congress did not intend. [footnote omitted] Given the rationale of *Allis-Chalmers* and *Scofield*, the Board's conclusion that §8(b)(1)(A) of the Act has nothing to say about union fines of this nature, whatever their size, is correct. Issues as to the reasonableness or unreasonableness of such fines must be decided upon the basis of the law of contracts, voluntary associations, or such other principals of law as may be applied in a forum competent to adjudicate the issue. *Under our holding, state courts will be wholly free to apply state law to such issues at the suit of either the union or the member fined.*" 412 U.S. at 74.(emphasis supplied, footnotes omitted).

As summarized in *Brown*, this Court has decided several cases where state court action impinged on union decision making:

> "We have, therefore, refrained from finding that the NLRA pre-empts state jurisdiction over state breach of contract actions by strike replacements, state trespass actions or state tort remedies for intentional infliction of emotional distress." 104 S. Ct. at 3186 (citations omitted).

The logical extension of Appellants' claim is that they are wholly free to ignore all state laws that may impinge on strike strategy decision making. Such a claim is without foundation.

VII. FREEDOM OF ASSOCIATION

APPELLANTS HAVE FAILED TO PRESENT A SUBSTANTIAL FEDERAL FREEDOM OF ASSOCIATION QUESTION FOR THE REASON THAT THIS COURT HAS ALREADY DECIDED, IN TERMS OF ECONOMIC ASSOCIATION, TO ALLOW REASONABLE REGULATION

As set forth in section II of this Brief, there is no controversy. None of the Appellants were, nor could they have

been, terminated from employment; the allegation that sets up the freedom of association position of Appellants. In addition, the statute in question is not a regulation.

Freedom of Association as guaranteed by the First Amendment applies to labor organizations. *United States v. Pipefitters Local Union No. 562*, 434 F. 2d 1116 (8th Cir., 1970). When it comes to purely economic activity, however, the freedom is not absolute and is subject to reasonable "regulation" when there is a compelling state interest.

In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1940), the State of Missouri regulated combinations in restraint of trade. Union ice peddlers attempted to combine with ice manufacturers so that they would not sell ice to non-union peddlers. The Missouri statute made such an agreement a crime punishable by fine and imprisonment. In response to a First Amendment attack, this Court said:

> "We are without constitutional authority to modify or upset Missouri's determination that it is in the public interest to make combinations of workers subject to laws designed to keep the channels of trade wholly free and open. To exhalt all labor union conduct in restraint of trade above all state control would greatly reduce the traditional powers of states over their domestic economy. . . ." 336 U.S. at 497

Indeed, there are many cases in which both state and federal regulations, held to represent legitimate governmental interests, have withstood First Amendment challenges. In *NLRB v. Retail Store Employees Union*, 447 U.S. 607 (1980), the Supreme Court disallowed secondary picketing under Section 8 of the NLRA. In *Larry V. Muko, Inc. v. Southwestern Pennsylvania*, 609 F. 2d 1368 (3rd Cir., 1979) (en banc), the Court disallowed under state law a monopolistic agreement entered into by two labor unions and an employer. In *NLRB v. Arrow Molded Plastics Inc.*, 653 F. 2d 280 (6th Cir., 1981), the court restricted pre-election speech of the employer under Section 8(a)(1) of the NLRA.

Finally, in *Martin Sprocket & Gear Co. v. NLRB*, 329 F. 2d 417 (5th Cir., 1964), the Court restricted under the NLRA, the right of an employer to question employees regarding their union sympathies.

Appellants, therefore, do not present a substantial federal question.

IX. RELIEF SOUGHT

The Appellee prays that this Honorable Court dismiss the captioned appeal.

Respectfully submitted,

J.R. WHEATLEY
ASSISTANT GENERAL COUNSEL
GENERAL MOTORS CORPORATION
3044 W. Grand Blvd.
Detroit, MI 48202
(313) 556-4021

FILDEW, HINKS, GILBRIDE, MILLER & TODD
By: JONATHAN N. WAYMAN
3600 Penobscot Building
Detroit, MI 48226
(313) 961-9700

REPLY

BRIEF

No. 85-117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

A.G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee,

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

REPLY TO GENERAL MOTORS' MOTION TO DISMISS

FRED ALTSHULER
Altshuler and Berzon
177 Post Street, Suite 600
San Francisco, California 94108
(415) 421-7151

JORDAN ROSSEN
Counsel of Record
RICHARD W. McHUGH
DANIEL W. SHERRICK
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

Counsel for Appellants

TABLE OF CONTENTS

INDEX OF AUTHORITIES

No. 85-117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

A.G. BAKER, JR., KENNETH COLLIER, and
ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee,

REPLY TO GENERAL MOTORS' MOTION TO DISMISS

I.
THE QUESTION IS SUBSTANTIAL

1. General Motors (GM) attempts to argue that prior decisions of this Court have "so explicitly foreclosed" the issue presented here that review is inappropriate. (GM Br. at 7, quoting *Equitable Live v. Brown*, 187 U.S. 308, 311 (1902).) In doing so, GM cites this Court to two prior decisions, one explicitly disclaiming any view on any of the questions raised here and one explicitly limited to consideration of only one of the three independent branches of the preemption doctrine relevant here.

In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) the Court was faced with an argument that the Social Security Act or the Federal Unemployment Tax Act preempted all state laws which disqualify individuals whose

involvement in a labor dispute is not "voluntary". The Supreme Court rejected this facial attack on state law but carefully noted that it did not "consider or decide" any issue of NLRA preemption of state unemployment law. 431 U.S. at 475, n. 3.

Issues of NLRA preemption were not addressed in *Hodory* for good reason: that case — unlike the present one — presented no issues of state interference with conduct protected by the NLRA, nor state regulation of conduct which Congress intended remain unregulated, nor state encroachment on the primary jurisdiction of the NLRB.[1] The present case, in contrast, presents a direct question of NLRA preemption of state law which — as interpreted by the Michigan Supreme Court — exhibits all three of these prohibited results.

GM also argues that this Court's decision in *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979) forecloses the need for review here. In that case the Court applied what is commonly known as the *Morton/-Machinists* branch of the preemption doctrine and concluded that the NLRA did not preempt a state law allowing payment of unemployment benefits to strikers after several weeks. In particular, petitioners there argued that the state law impermissibly "altered the economic balance between labor and management" 440 U.S. at 532. This alteration of bargaining leverage was the *sole* basis for the preemption claim.[2] The court emphasized that there was no question presented regarding preemption based on interference with conduct

[1]The Ohio statute, like any unemployment statute addressing labor dispute disqualifications, had the inevitable effect of providing some marginal incentive or disincentive to engage in strike activity. As discussed infra, this Court in *New York Telephone* concluded that these inevitable and marginal effects alone do not warrant preemption. Appellants here do not argue that preemption is required because of any potential effect Michigan's interpretation of MESA may have on an individual employee's willingness to strike.

[2]The dissent vividly illustrates the centrality of this concern. 440 U.S. at 551-552.

actually protected by Section 7 or the primary jurisdiction of the NLRB. 440 U.S. at 529.[3]

In contrast, Appellant's preemption claim here raises three independent bases for preemption, none of which were addressed in *New York Telephone*. First, Michigan's interpretation of MESA impermissibly penalizes employees and unions for their exercise of the carefully crafted federal rights of employees to pay union dues, to bargain collectively, and for union security agreements to require payment of such dues as a condition of employment. (Appellant's Brief at 8-15). Second, Michigan's interpretation of MESA impermissibly intrudes on internal union decisions regarding the timing of dues increases and internal allocation of the moneys collected. (Appellant's Brief at 15-21)[4] Finally, Michigan's interpretation impermissibly intrudes on the primary jurisdiction of the NLRB by involving the Michigan state courts and agencies in determinations regarding the "regularity" of dues requirements. (Appellant's Brief at 21-25) In *New York Telephone* these issues were neither raised nor addressed by the Court.

[3]GM relies on a portion of the concurring opinion which discusses Congressional intent to tolerate "any interference" caused by state law. (GM Brief at 12) That opinion agreed with the plurality opinion that the sole basis for preemption in that case was the tendency for payment of unemployment benefits to strikers to "alter the economic balance between labor and management." 440 U.S. at 547. Thus the Congressional intent to tolerate "interference" found there is similarly limited to "interference" with the "economic balance" between management and labor. The holding of *New York Telephone* cannot be read so broadly as to encompass the distinct forms of state interference at issue here.

[4]Although this claim involves the same branch of the preemption doctrine as that raised in *New York Telephone*, Appellant's claim here raises a very different basis for preemption than that present in *New York Telephone*. In *New York Telephone*, the basis for the preemption claim was the effect of the state law on the relative bargaining positions of the parties. The Court concluded that Congress had not intended that states be prohibited from enacting legislation which tips the scales of collective bargaining by paying benefits to strikers. Here, in contrast, Michigan's interpretation has intruded on an area — internal union decisions regarding dues structures and allocations — which Congress has repeatedly concluded should remain free from regulatory interference.

2. GM also attempts to distinguish *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). This atempt is fatally flawed because it is based on a gross misreading of this Court's decision in *Brown v. Hotel and Restaurant Employees*, — U.S. —, 104 S.Ct. 3179 (1984). GM claims that *Brown* stands for the proposition that the "actual conflict" branch of the preemption is only applicable when "[c]ompliance with both federal and state regulations is a physical impossibility." (GM's Brief at 19) In making this argument, GM has simply misread a crucial passage of Justice O'Connor's opinion in *Brown*. The full quote reads:

> Such actual conflict between state and federal law exists when 'compliance with both federal and state regulations is a physical impossibility' [citations omitted] *or* when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'
> 104 S.Ct. at 3186 [emphasis supplied]

Justice O'Connor then applies these general preemption doctrines to the field of labor law and concludes that:

> [I]f employee conduct is protected under § 7, then state law which interferes with the exercise of these federally created rights creates an actual conflict and is preempted by direct operation of the Supremacy Clause. *Id.* [citing *Nash*]

In other words, the Court concluded that to ensure "accomplishment and execution of the full purposes and objectives of Congress," states may not be allowed to "interfere" with the exercise of federally protected rights. And as *Nash* squarely holds, one form of such impermissible interference is the denial of eligibility for unemployment benefits because of an individual's exercise of rights guaranteed by the NLRA.

II.
PROCEDURAL ISSUES

GM also raises a flurry of procedural issues which can all be put to rest in short order. GM argues primarily that Appellant's

Jurisdictional Statement is fatally defective because it does not comply with Supreme Court Rule 15.1(g) and because Appellants failed to raise one of the three relevant branches of the NLRA preemption doctrine in proceedings below. These contentions are both simply false and based on incorrect readings of applicable standards.

There is no dispute over where the issues presented here were raised and considered below. As the Michigan Supreme Court found, the federal preemption issues presented here logically follow the determination by the state courts that Appellants' conduct here "financed" a labor dispute. The Michigan Supreme Court therefore explicitly withheld consideration of the federal issues until after remand. (79a)[5].

These facts were made clear in Appellants' Jurisdictional Statement. Thus, Appellants informed this Court that the Michigan Supreme "[c]ourt reserved the federal issues for its later ruling if necessary" and that only "[a]fter concluding that the dues increase 'financed' a labor dispute . . . [did] the Michigan Supreme Court address[] the federal preemption issues." (Jurisdictional Statement 6,7) Appellants' Jurisdictional Statement identifies where the federal issues were presented and addressed below and therefore complies with Supreme Court Rule 15.1(g).

GM also argues that this Court should not consider one aspect of the doctrine of NLRA preemption here because, GM claims, Appellants failed to raise this particular aspect of the doctrine below. The issue of NLRA preemption was properly

---

[5]To avoid burdening this court with a detailed litany of the multiple proceedings in various lower state courts and agencies, addressing primary state law issues not relevant here, Appellants explicitly incorporated the factual discussions of the Michigan Supreme Court decisions into their Statement of the Case in the Jurisdictional Statement. (P. 3, n.2) The pre-remand Michigan Supreme Court decision explains in detail how the federal issues were dealt with — or deferred — by the other Michigan Courts. (96a-97a) Two state Circuit Courts failed to reach these federal issues because they ruled for Appellants on state laws only grounds (96a, 83a)

raised and extensively briefed below and was addressed in detail by the Michigan Supreme Court in its post-remand and pre-remand decisions. (51a-69a, 91a-93a, 95a, 96a) GM now claims that Appellants should be foreclosed from arguing here one branch of the complex but interlocking doctrine of NLRA preemption, namely that branch designed to protect the primacy of federal labor policy by prohibiting state inference with the primary jurisdiction of the NLRB.

Even if GM were correct in claiming that Appellants had not raised this particular branch of the preemption doctrine below, which Appellants do not concede,[6] GM's contention is legally insufficient to foreclose review here because it ignores the crucial distinction between "questions presented" below and "arguments" made below. This Court has repeatedly held that parties are not foreclosed from making new arguments, but only from presenting "entirely new questions." *Illinois v. Gates*, — U.S. —, 103 S.Ct. 2317, 2322 (1983), *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). Obviously, Appellants' argument that Michigan has here impermissibly interfered with federal labor policy by intruding on the primary jurisdiction of the NLRB is but one aspect of the "question" of NLRA preemption which was indisputably and properly raised below.

III.
CASE OR CONTROVERSY

Finally, GM argues that the present matter presents no "case or controversy" as required under Article III of the U.S. Constitution. This argument, raised for the first time here,

[6]Appellants believe that their repeated contention below that Michigan's interpretation of MESA here impermissibly interfered with federal labor law fairly encompassed the narrower argument that Michigan has here impermissibly intruded on the primary jurisdiction of the NLRB. Therefore, Appellants believe that this branch of the preemption doctrine was indeed "raised below." Moreover, the 1968 NLRB ruling and U.S. District Court ruling, upon which this argument is based, are part of the record here (144a-155a) and were part of the record below. (91a-93a, 91a, n. 25)

demonstrates a remarkable misunderstanding of the basic tenets of Article III. The present appeal challenges the Michigan Supreme Court's decision to deny unemployment benefits to thousands of UAW members because those individuals made dues payments which allegedly "financed" a labor dispute causing their unemployment. Should Appellants prevail in their argument that such a construction of state law is preempted by the NLRA, Appellants will receive their earned unemployment compensation for the weeks of their unemployment. It is difficult to imagine a controversy more "definite and concrete" or more closely "touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227 at 240-241 (1937). This case therefore presents a justiciable controversy under Article III.

GM may here be suggesting that Appellants' preemption argument somehow depends on an evidentiary showing that Appellants were in fact deterred from exercising federally protected rights. Thus, GM argues that because no Appellant presented testimony that he or she was actually fined by the union, discharged from employment or expelled from the union for failure to pay the dues at issue, Appellants have failed to state a case.[7] This argument is somewhat baffling.

As this Court's preemption decisions make clear, the case for preemption is made out by a showing of a *confict* between

[7]In any event, GM is also incorrect in this factual claim. In hearings before the Michigan Employment Security Commmission Board of Review Mr. Jerry Wilse, Director of the UAW's Strike Insurance Department testified without contradiction as follows:

> If they had not paid their dues during those periods of time they would have been considered delinquent under the UAW Constitution; they would not have been entitled to any strike benefits under any circumstances until after they paid that money, the dues money, plus their reinstatement fee; and then on top of that if they still don't pay, the local union financial secretary under the union security clause could have sent the company a letter authorizing their discharge for non-payment of dues. [1983 Appendix of Plaintiffs-Appellants filed with Michigan Supreme Court. Vol. I at 17a.]

federal and state law. Our research has revealed no support for GM's novel argument that a preemption claim must be supported by an empirical evidentiary showing that individuals were actually deterred from exercising federally protected rights.

Thus, for example, in *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), petitioner was a single individual who had filed charges with the National Labor Relations Board and was therefore denied eligibility for unemployment benefits by the State of Florida. Petitioner there, as Appellants here, when confronted with the choice of exercising federal rights or maintaining eligibility for state benefits, chose the former. The Court in *Nash* nowhere even alluded to any introduction or consideration of empirical evidence that other individuals had made the opposite choice — to refrain from exercising federal rights in order to maintain eligibility. And yet this court had no difficulty concluding that Florida's application of the state law was preempted because it presented an intolerable conflict with the federal right to file NLRB charges.

Similarly in the entire line of cases finding state laws preempted because of impermissible "actual conflicts" with federal rights which our research has revealed, we find not a single mention of a need for introduction of empirical evidence of the sort GM would apparently require. Instead, in all these cases, it is the presence of a conflict between state and federal law which gives rise to preemption. *Auto Workers v. O'Brien,* 339 U.S. 454, 458 (1950); *Bus Employees v. Wisconsin,* 340 U.S. 383, 394 (1951); *Bus Employees v. Missouri,* 374 U.S. 74, 82 (1963); *Brown v. Hotel and Restaurant Employees,* ____ U.S. ____, 104 S.Ct. 3179, 3186 (1984).

Because, as Appellants have shown, a similar conflict exists here, Michigan's interpretation of MESA is preempted by federal labor law.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

Fred Altshuler
Altshuler & Berzon
Suite 600
177 Post Street
San Francisco, CA 94108
(415) 421-7151

Jordan Rossen
(Counsel of Record)
Richard W. McHugh
Daniel W. Sherrick
8000 East Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

By: _____
Jordan Rossen

And: _____
Daniel W. Sherrick

Attorneys for Appellants

Dated: October 8, 1985

JOINT

APPENDIX

No. 85-117

In the Supreme Court of the United States

OCTOBER TERM, 1985

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,

Appellants,

v.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

On Appeal from the Supreme Court of Michigan

JOINT APPENDIX

* JORDAN ROSSEN
RICHARD McHUGH
DANIEL W. SHERRICK
8000 East Jefferson
Detroit, Michigan 48214
(313) 926-5216

FRED ALTSHULER
Altshuler and Berzon
177 Post Street, Suite 600
San Francisco, California 94108
(415) 421-7151
Counsel for Appellants

J.R. WHEATLEY
ASSISTANT GENERAL COUNSEL
GENERAL MOTORS CORPORATION
3044 W. Grand Blvd.
Detroit, MI 48202
(313) 556-4021

FILDEW, HINKS, GILBRIDE, MILLER & TODD
*JONATHAN N. WAYMAN
3600 Penobscot Building
Detroit, MI 48226
(313) 961-9700
Counsel for Appellee General Motors Corporation

* Counsel of Record

APPEAL DOCKETED JULY 22, 1985
JURISDICTION NOTED OCTOBER 15, 1985

THE INLAND PRESS, DETROIT, MICHIGAN

105

INDEX TO APPENDIX*

*This Appendix was attached to Appellants' Jurisdictional Statement. The Joint Appendix is numbered after 159a to reduce confusion.

INDEX TO JOINT APPENDIX

RELEVANT DOCKET ENTRIES

Date	*Agency/Court*
11/21/68	MESC Determination — Held claimants were eligible and not disqualified.
6/29/71	MESC Referee Decision — Disqualified claimants.
6/21/72	MESC Appeal Board Decision — Affirmed disqualification.
4/24/74	Ingham Co. Cir. Ct. (*Seidell* v *GM and MESC)* — Held claimants disqualified.
5/9/74	Genesee Co. Cir. Ct. (*Baker* v *GM and MESC)* — Held claimants not disqualified.
5/30/74	Wayne Co. Cir. Ct. (*Collier* v *GM and MESC)* — Held claimants not disqualified.
3/28/77	Michigan Ct. of Appeals — Held claimants disqualified.
10/16/80	Michigan Sup. Ct. — Reversed in part and Remanded to MESC Board of Review, while retaining jurisdiction.
6/10/82	MESC Board of Review Plurality Advisory Opinion — Disqualified claimants.
12/28/84	Michigan Sup. Ct. after remand. — Disqualified claimants, three to three.
10/15/85	U.S. Sup. Ct. — Noted Probable Jurisdiction.

MESC MULTI-CLAIMANT UNIT
DETERMINATION
(November 21, 1968)

To: Branch Office Unemployment Insurance Division,
I.B. Unit and Branch Office Statewide
From: Multi-Claimant Unit, Benefits Section
By: J. Tredinnick, Supervisor
Subject: LABOR DISPUTE—
General Motors Corporation
General Motors Building
3044 W. Grand Boulevard
Detroit, Michigan 48202

DETERMINATION

Findings Of Fact:

The General Motors Corporation, a Delaware Corporation, hereinafter referred to as the Corporation, is principally engaged in the manufacture, assembly and distribution of products such as motor vehicles and accessories. For managerial purposes, the Corporation has established internal units or divisions throughout the Country within its own Corporate structure and these units or divisions in turn operate various plants or locations for the performance of specific functions.

MESC Determination

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, hereinafter referred to as the Union, is the exclusive bargaining representative for the hourly rated production and maintenence employees at all plants of the Corporation. The Corporation and the Union have mutually agreed that members of the Union at all Plants of the Corporation are to be considered a single national bargaining unit under a single National Agreement with local supplements.

Each plant of the Corporation has its own Union bargaining unit which is termed a "local shop committee" in the National

Agreement. These local units bargain separately with local plant management with regard to local wage, seniority, shift preference, and other working conditions unique to that particular plant's operations. The Local Agreements are conterminous with the National Agreement and have no termination or modification clauses of their own. Local Agreements are subject to approval by the national parties before they can become effective and binding.

It has previously been determined per information submitted by both the employer and the Union in the ajudication of prior labor disputes involving General Motors plants that each plant meets the criterion of a separate establishment in accordance with the decision rendered by the Michigan Supreme Court in the *Park-Dorsey Case.*

A National Agreement effective January 1, 1968 had been ratified by the union membership on December 15, 1967. Subsequent to the effective date of the National Agreement labor disputes over local issues occurred at the following General Motors locations:

Chevrolet Grey Iron Foundry of Saginaw — January 17-27, 1968

Chevrolet Manufacturing of Flint — February 13-14, 1968

Chevrolet V-8 Engine of Flint — February 13-15, 1968

As a result of these disputes a number of employees employed in various General Motors plants were laid off due to parts shortages, etc.

On January 23, 1968 the General Motors Corporation submitted a list of documents to the Commission relating to the October 1967 increase in UAW membership dues during the "collecting bargaining emergency." General Motors has failed as of today's date to reply to the Commission's letter dated February 28, 1968 requesting specific and detailed information concerning individuals who became unemployed due to a labor dispute over local issues in the establishment in which they were employed and individuals who were laid off at other

General Motors plants due to parts shortages, lack of ability to ship products etc., caused by the strikes at the Chevrolet Grey Iron Foundry of Saginaw, Chevrolet Manufacturing of Flint and Chevrolet V-8 Engine of Flint.

Under date of March 1, 1968 a letter requesting information relative to the above labor dispute was mailed to the International Union UAW-AFL-CIO by the Multi-Claimant Unit as the authorized representative of the Commission. Mr. Jordan Rossen, Assistant General Counsel for the International Union, submitted detailed information to the Multi-Claimant Unit pertinent to the 1968 General Motors labor disputes and resulting layoffs in a reply dated May 23, 1968.

This determination, which is based on the facts on hand will be concerned with the qualification for benefits of individuals who became unemployed due to labor disputes in active progress in the General Motors establishments in which they were employed as well as the unemployment of claimants who became unemployed on account of layoffs by management in other General Motors plants due to curtailment of production resulting directly or indirectly from strikes due to local issues at the above-named three company plants. The issues raised at the striking plants and the dates when agreement was reached thereon are as follows:

A. *Chevrolet-Saginaw Grey Iron Foundry*

Two issues led to the January 17, 1968 strike at this plant. The Union requested safety shoes for the plant's foundry workers and wash-up time. Both local demands were settled on January 27, 1968. Other principal issues involved in local bargaining included:

(1) Coveralls for foundry workers—settled January 15, 1968.

(2) Clean toilet and locker facilities—settled January 16, 1968.

(3) Shift preferences—settled January 24, 1968.

(4) Unsafe jobs—settled December 29, 1967.

(5) More exhaust and better ventilation—settled January 16, 1968.

B. *Chevrolet Manufacturing—Flint*

The issue which led to the February 13, 1968 strike was the local union's demand that a crane operator at this plant be returned to the No. 6 Die Room Crane Operator job and that a skilled Die Maker be taken off this Crane job. The Local Union wanted over-the-road drivers only to perform *over-the-road* work. These issues were settled on or about February 14, 1968. Other principal issues involved in local bargaining included:

(1) The assignment of committeemen within their own areas in the plant;

(2) The use of local "Pipefitters" to fill in for the absent Machine Repair, Hydraulic and Lubrication Men and to be accordingly paid under the local agreement.

(3) Adequate toilet facilities for Plant 10;

(4) Bulletin Boards in the new "Die Build" facility;

(5) The correction of various other plant job classifications of employees to reflect the work which they actually perform.

All of the above issues were settled on or about February 14, 1968. The Local Agreement was ratified February 18, 1968.

C. *Chevrolet V-8 Engine Plant—Flint*

The issue which led to the February 13, 1968 strike was the Local Union's demand that the Company return the Cutter Grinder work to the Cutter Grinder Room. The issue was settled on or about February 15, 1968. Other principal issues involved in local bargaining were:

(1) Payment of "jig work" for the performance of jig work.

(2) Creation of a Utility Classification in the plant;

(3) Establishment of a Gage Repair Classification for this plant, and

(4) Prevention of salary employees performing bargaining unit tape machine work.

All of the above issues were favorably settled on or about February 15, 1968.

The Local Agreement was ratified on or about February 17 and 18, 1968.

The issues described above were pertinent only to the plants above.

ISSUE AND SECTION OF MICHIGAN EMPLOYMENT SECURITY ACT INVOLVED:

LABOR DISPUTE SUBSECTION 29(8)

REASONS:

The facts establish that there were labor disputes in active progress for varying periods of time over strictly local issues at the General Motors (1) Chevrolet Grey Iron Foundry of Saginaw; (2) Chevrolet Manufacturing of Flint and (3) Chevrolet V-8 Engine of Flint.

The employer contends that the unemployment of the claimants was due to a labor dispute in active progress in their establishments or if the labor dispute did not exist in the claimants' establishment they were directly involved by their participation in and financing of the dispute under Subsection II of Section 29(8) of the Act which reads as follows:

> "An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this Subsection 29(8) if he is not directly involved in such dispute.

> (a) For the purposes of this Subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
> II. He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph."

The payment of the "extra assessments" as contended by the General Motors Corporation or "constitutionally instituted dues" as maintained by the union was established on October 8, 1967 which was prior to the local labor disputes and terminated January 16, 1968 which was also prior to the beginning of the General Motors labor disputes. It is therefore held that the claimants did not finance the local labor disputes under the provisions of Subsection II of the Act.

DETERMINATION:

It is determined that any unemployment suffered by claimants employed at the Chevrolet Grey Iron Foundry of Saginaw (January 17-27, 1968), Chevrolet Manufacturing of Flint, (February 13 and 14, 1968) and Chevrolet V-8 Engine of Flint (February 13-18, 1968), was due to a labor dispute in active progress in the establishments in which they were employed.

Accordingly, they are disqualified for unemployment benefits for any claimed week during said periods under the provisions of Subsection 29(8)(a) IV which disqualify all workers unemployed due to a labor dispute in their establishment regardless of their interest or participation in the labor dispute.

It is further determined that claimants employed in other General Motors plants who became unemployed due to parts shortage etc., did not participate in nor were they directly interested in the labor disputes at the Chevrolet Grey Iron

Foundry of Saginaw, Chevrolet Manufacturing of Flint or the Chevrolet V-8 Engine of Flint, and, therefore, they were not directly involved in such disputes. Hence, they are not subject to disqualification under the provisions of Subsection 29(8) of the Act for any periods of layoff related to said labor disputes in the aforementioned plants.

NOTE:
See 1968 G.M.C. Layoffs—Summary attached.
1968 General Motors Corporation Layoffs

MESC REFEREE DECISION
(Appeal No. B 69-2648(1), et al.)
MICHIGAN EMPLOYMENT SECURITY COMMISSION
REFEREE SECTION
DECISION
(June 29, 1971)

In the matter of the claim of:
Robert J. Seidell
538 Garfield Street
Fostoria, Michigan 48435
S.S. No.
Employer involved:
General Motors Corp., AC Spark Plug Div.
1300 N. Dort Highway
Flint, Michigan 48556
Appeal No. B69-2648(1) et al
REFEREE: ROBERT B. HART

The employer, General Motors Corporation, filed timely appeals from Commission *redeterminations issued on various dates which held that claimants were not disqualified for benefits under Subsection 29 (8) of the Act for certain specified periods of unemployment in January and February, 1968.*

Appearances:
Representing Claimants,
Zwerdling, Miller, Klimist and Maurer, Attorneys
By: A.L. Zwerdling
William L. Martens
Representing Employer,
John F. Breen
George Cherpelis
Edmond J. Dilworth, Jr.
K. Douglas Mann
Attorneys, General Motors Corporation
Ross L. Malone,
General Counsel, General Motors Corporation, of Counsel

This appeal was consolidated for hearing with appeals concerning claimants from twenty four other General Motors plants, pursuant to the provisions of Section 33 of the Act. Hearing of these appeals began on November 3, 1969, and continued on twenty-three separate dates thereafter. Separate decisions are being issued with respect to the claimants in each of the employer's plants.

Subsequent to the series of hearings, lengthy briefs were submitted to the Referee by the respective counsel for the parties. The Referee acknowledges the thoroughness and invaluable assistance of these briefs in preparing these decisions.

PART I
LOCAL PLANT UNEMPLOYMENT

AC Spark Plug, a division of General Motors Corporation, manufactures a variety of vehicle parts, such as instrument clusters, air cleaners and filters, oil filters, gas tanks, etc. These parts are supplied to some 29 General Motors automobile assembly plants plus GM Engines plants. The original equipment customers account for about 50% of the total production of AC Spark Plug.

AC Spark Plug has plant storage facilities for only a five to seven-day supply of products which go to its original equipment market.

This appeal involves the claims for benefits of approximately 155 claimants at AC Spark Plug. There was unemployment at this plant between January 29, 1968, and February 12, 1968, which ranged from a low of 20 workers to a high of 870 workers out of a total plant work force of approximately 9500. These employees were sent home by the company as various product lines reached a saturation of plant storage and demands of customer plants were reduced. The customer plants, such as 25 out of 29 assembly plants, were forced to curtail or cease operations because of a lack of engines and the engines were not available as a result of foundry strikes at Saginaw,

Michigan, from January 17 to 27, 1968; Defiance, Ohio, from January 16 to 27, 1968; and Tonawanda, New York, from January 19 to 30, 1968. The foundries produced the castings necessary for engine production.

The strikes at the foundry plants occurred over unresolved local contract issues following expiration of the previously existing local agreements on September 6, 1967. The AC Spark Plug workers ratified their own new local contract agreements on January 24 and 25, 1968. They did not strike or otherwise withhold their services from the employer during the period of unemployment in question.

PART II
THE NATIONAL LABOR DISPUTE

General Motors Corporation, hereinafter referred to as the employer, is a Delaware Corporation, which for the purposes of this appeal is engaged in the manufacture and sale of automobiles and other vehicles. It employs more than 300,000 people at some 120 locations throughout the United States and Canada. While production of vehicles is diffused and decentralized, corporate policy, planning and production control are centralized in Detroit, Michigan. The decision as to which plant will produce how many of what cars or parts for cars are made in Detroit. Production schedules originate in Detroit. This geographical diffusion of the employer's operations is the main thing that distinguishes this corporation from a single plant operation. That distinction, however, is central to the application of the labor dispute provisions of the Michigan Employment Security Act.

The bulk of General Motors production and maintenance employees, including claimants herein, are represented by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, commonly known as the UAW and hereinafter referred to as the union. Collective bargaining between these employees and the employer is car-

ried on at two distinct levels — national and local. There is a "national agreement" which is negotiated by and between the "national parties," that is, General Motors Corporation and the UAW. Also, each plant location of the company and each local division of the union carry out "local negotiations" to arrive at "local agreements" consisting of a local seniority agreement, local shift preference agreement and local wage agreement. These local agreements, however, must be approved by the national parties. Further, the national agreement provides that "No provisions of any local agreement between plant management and the shop committee therein shall supersede or conflict with any provision of this agreement" (Exhibit 2, page 147, Article 220).

Every three years contract negotiations take place between the employer and the union on these dual local-national levels. The spheres of these negotiations are in great measure very well defined and recognized by the participants. Although some of the many union demands made upon the employer by the union are duplicated at both the national and local level, the record indicates this overlap is minimal and succinctly handled by the employer by refusing to negotiate on "two fronts."

For the purpose of this appeal, the national agreement of 1964 expired at 11:59 p.m. on September 6, 1967. Prior to this, the union had served notice of termination of the contact upon the employer and strike authorization had been voted by the union membership.

Negotiations toward a new national agreement began on July 15, 1967, and continued thereafter until December 15, 1967, when there was a national settlement. That agreement was ratified by the union membership on December 28, 1967, and became effective January 1, 1968, (Exhibit 32).

It is vital to remember that at the time of the unemployment involved herein there was a final, binding and operative national agreement between the parties.

PART III
LOCAL DISPUTES AND STRIKES

Despite the existence of a national settlement, and despite the fact that there was no national strike, thousands of local demands remained unsettled between the local parties into January, 1968. By virtue of language in the national agreement, the union could still strike local plants of the corporation over these unresolved local issues. (Paragraph 12, 1967 "Contract Settlement Agreements," Exhibit 32). It was just such local dispute strikes which, it is contended, resulted in the unemployment herein.

These local issue strikes were all pursuant to earlier strike votes and after notice of termination of local agreements which were coterminous with the national agreement.

The most significant local strikes were those at Central Foundry, Defiance, Ohio, from January 16, 1968, through January 26, 1968; Chevrolet Saginaw Foundry, January 17, 1968, through January 26, 1968; and Chevrolet Tonawanda Foundry from January 19, 1968, through January 30, 1968.

In addition, other local strikes occurred at Chevrolet-Flint Manufacturing and at Chevrolet V-8 Engine in the State of Michigan, as well as assembly plant strikes at Framingham, Massachusetts; Lordstown, Ohio; Van Nuys, California, and Atlanta, Georgia.

While the periods of unemployment at issue in these appeals occurred in January and February, 1968, some local plant agreements continued in dispute thereafter. It was not until July 18, 1968, that the last of the local contracts was ratified.

PART IV
UNION DUES STRUCTURE AND AMENDMENTS

The UAW International Constitution adopted in 1964 provided in Article 16 for a payment of initiation fees and dues.

Minimum monthly dues were established in 1964 at $5.00 per member, of which $3.75 was allocated as administrative dues and $1.25 allocated to the union strike insurance fund.

Administrative dues were divided between the locals and the International and sub-allocated to various activities. All of the $1.25 strike fund portion went into the International Strike Insurance Fund.

On October 8, 1967, the International Union held a special convention in Detroit, Michigan. One of the union purposes of this convention was consideration of an amendment of the dues structure, since at that time, a strike was already in progress against the Ford Motor Company which had been chosen as the "target" company in the industry for that year.

The special convention amended Article 16 of the Constitution to provide for "emergency dues" beginning as of October 8, 1967, "and for each month thereafter during the emergency as defined in the last paragraph of this Sub-section." For the period of this "emergency," union strike insurance fund dues were raised from the amounts established in 1964 to $11.25 per month or $21.25 per month, depending on the average wage levels in the plant where the particular union member was employed. (Exhibit 23a, page 3)

Article 16 was further amended to provide that "this schedule of dues shall remain in effect during the current collective bargaining emergency as determined by the International Executive Board and thereafter if necessary, until the International Strike Insurance Fund has reached the sum of twenty-five million dollars ($25,000,000), at which time the dues structure established in 2(b) below shall become effective." Section 2(b) provided, in substance, that following the "emergency," new minimum dues would be the equivalent of two hours straight time pay per month for each member. This sum was then to be divided 40% to the local union and 30% each to the General Administration Fund of the International and the Strike Insurance Fund.

The record before the Referee in these appeals established that these "emergency dues" were in force only during the months of October and November, 1967. These months fell in the "no contract period" so that there was no checkoff of dues by the employer.

With respect to these "emergency dues" and payments from the union strike fund, counsel for the parties in this appeal have stipulated as follows:

1. That each of the claimants employed at 25 Michigan plants of General Motors involved herein paid "emergency dues" to their respective UAW Local Unions for each of the months of October and November, 1967 in accordance with the provisions of Article 16, Section 2, a & b of the Constitution of the International UAW as amended in October, 1967 (Exhibit 23a in the record).

2. That that portion of the aforesaid "emergency dues" paid by the claimants identified in said amended constitution as "Union Strike Insurance Fund Dues" was remitted by the respective Local Unions in which the claimants held membership to the International Union, UAW, and was placed in the "International Union's Strike Insurance Fund," in accordance with the provisions of Article 16, Section 10A of said amended Constitution.

3. That the UAW members, in good standing, who were on strike at the Chevrolet Tonawanda, New York Foundries; Chevrolet Saginaw, Michigan Foundries and the Central Foundry at Defiance, Ohio, during the period from January 17, 1968 through February 1st, 1968 were paid and received strike benefits from the aforesaid "International Union's Strike Insurance Fund" in accordance with the provisions of said amended Constitution and in accordance with the provisions of the Exhibit 183 which has previously been introduced and is identified as the UAW Administrative Letter, Volume 19, Letter No. 19, dated October 31, 1967.

PART V
ISSUES AND ANALYSES

The issues before the Referee in these appeals is whether any of these claimants should be disqualified for claimed weeks of unemployment as specified in Part I above under the provisions of Subsection 29(8) of the Employment Security Act.

The labor dispute provision of the Act is divided into two major areas, the so-called "basic provision" and the tests of direct involvement which are sometimes termed "escape clauses." At the threshhold of any adjudication, the requirements of the "basic provision" must be satisfied before any consideration is given to whether claimants can ultimately be disqualified because they are "directly involved" in the labor dispute. *Park* v *Employment Security Commission*, 355 Mich. 103 (1959)

Subsection 29(8) of the Act provides:

> "An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute."

Unless the facts establish that the unemployment was "due to a labor dispute in active progress" either in the establishment where the claimant worked or in a functionally integrated establishment, the consideration of "direct involvement" is not necessary.

At the outset, if the unemployment was due to something other than a labor dispute, no disqualification order under 29(8) can result.

With respect to the "due to" or causation phrase, counsel for claimants stressed during the hearings and in his brief, that there was only "curtailment" of operations rather than a"shutdown" in most of the plants. The causative factor is obviously much easier to identify and establish in a situation where the total work force or at least the majority of that force is unemployed. However, it is immaterial whether all or only some of the work force is unemployed, if such unemployment is "due to" a labor dispute.

It is urged that the employer has not met its burden of proof as to causation. The Referee is aware of the Supreme Court holding that an employer has the burden to "produce competent and controlling evidence" of facts that were "peculiarly within the knowledge and control of the employer." *Michigan Tool Company* v *Employment Security Commission,* 346 Mich. 673 (1956). However, the factual nub to be established in the *Michigan Tool* case was a "slowdown," that is, an alleged action of the employees. We are dealing here with a different factual problem. In the instant appeal, it is undisputed that the claimants were sent home at the direction of the employer. In this connection, the Referee must note that the record is barren of testimony from any claimant which would suggest that his unemployment for the period in question was caused by any reason other than that advanced by the employer.

The Referee will not belabor this decision with the details of the testimony from the record. We conclude from a review of the evidence that the employer has made a prima facie case to establish that the unemployment of these claimants was "due to" a labor dispute.

Next it is necessary to consider whether the unemployment

was caused by a labor dispute "in active progress." The meaning of the phrase "active progress" is not defined in the statute, nor has there been any definitive interpretation by the higher courts of this state. However, for the purpose of applying the "basic provision" of 29(8) in this instance, the exact meaning of the phrase is not crucial. (The meaning of active progress will become more pertinent in later aspects of this decision.) The clear facts of this appeal show that the unemployment occurred because of a *strike* at another plant of the employer. It cannot seriously be contended that when a strike does occur, that the labor dispute can be anything but "in active progress." Even though there was a national settlement and the disputes thereafter strictly local, such disputes were very active and progressing at the time of the unemployment. At this point, there was nothing dormant about them. On the evidence, it is held that the claimants' unemployment was "due to a labor dispute in active progress."

Having reached this point, the statutory path divides into two directions. The language refers to both a labor dispute in claimants' establishment, or in the alternative, to a labor dispute in a "functionally integrated" establishment within the United States operated by the same employing unit.

There is no "establishment" problem in this appeal. It is clear that the unemployment at issue and the labor dispute which caused it occurred in separate establishments of the employer by the tests of *Park* (supra). But, since *Park*, the statute has been specifically amended to provide for possible disqualification when unemployment results from a labor dispute in an establishment *other* than where claimant worked, but which is "functionally integrated" with the establishment where the claimant worked, and operated by the same employing unit. Such "other" establishment need not be in Michigan.

Reference has been made throughout the hearing and in the briefs, to the so-called "one labor dispute" theory. This argument holds that the same omnipresent "labor dispute" continued to

exist in all plants of the employer from the point of notice of termination of the national and local contracts until all local and national issues between the parties were resolved. It is argued that even though a national agreement was reached, the labor dispute continued until the last local contract was settled. We think that it is now well established in this state that this "national strike" concept which wraps everything up on one large and encompassing labor dispute, is not the law of this state. *Horace Bruff et al* v *General Motors Corp.,* 24 Mich. App. 608 (1970). This argument is at last laid to rest and we can move on to other things.

The entire record, not only with respect to this plant, but with respect to all of the employer's plants engaged in vehicle manufacture, unequivocally demonstrates functional integrality throughout the employer's manufacturing organization. An assembly plant cannot assemble vehicles without engines. The engine plant cannot make engines without cylinder block castings. The trim and other parts plants cannot continue to produce parts for vehicles which are not being assembled. Manufacturing, shipping, and assembly schedules are all centralized, consolidated, and integrated.

Transportation systems between plants form a pipeline which may run dry or become glutted as the case may be, and the parts plants which cannot ship to their customer plants, do not have storage areas for unlimited production which is not immediately put to use. This integration of function exists regardless of whether the adverse effect is on the shipping or receiving end, and even if the causative factor is one or two plants removed from the situs of the unemployment.

As with the question of causation, the "curtailment" of operations herein, rather than a complete shutdown, brings the issue of integration of function into sharper question. Nonetheless, the evidence demonstrates that the unemployment at issue was caused by a local labor dispute in active progress in a plant other than that employing claimants, but that there

was integration of function between the plant with the dispute and the plant with the unemployment.

The Referee believes that all of the elements required for disqualification under the "basic provision" of 29(8) are established by the record in this appeal.

Even though claimants may come within the terms of the basic provisions of the statute, they are not disqualified for benefits unless it is shown that they are "directly involved" in the labor dispute which caused their unemployment. The statute contains four paragraphs setting forth tests of direct involvement. It is conceded by counsel for the employer that only paragraph 11 is applicable (employer's brief pg. 133).

Subsection 29(8) (a) II provides as follows:

> (a) For the purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
>
> * * *
>
> II. He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph.

It is obvious that within this subparagraph there are three separate tests for determining direct involvement—"participating," "financing," or "directly interested."

At the outset we can dispose of those tests of the statute which are not applicable in the instant appeal. There is no evidence in this record to establish that any of these claimants "participated" in the labor dispute which caused their unemployment. The claimants were a ready, willing, and able workforce in their own plant, and would have continued working except they were sent home by the employer. The unemployed workers had a national agreement, and they either had a local

agreement or at least there was no existing strike in their plant. The claimants did not picket either at their plant or at the struck plants.

Further, the Referee is persuaded by the evidence that the claimants were not "directly interested" in the outcome of the strikes. In the case of the foundry strikes, the matters at issue in those plants were peculiar to the working conditions and environment of the foundries. There is no persuasive evidence that any of the benefits which may have been won by the striking workers in their own local agreements would affect the local agreements of the unemployed workers, or that these benefits would eventually be extended to the unemployed workers. The elaborate provisions of the statute with respect to determining "directly interested" simply are not applicable here. The considerations which led to the disqualification of claimants in the case of *Bartholomew Burrell* v *Ford Motor Company*, 24 Mich App 651 (1970) are not present here. In *Burrell,* there was only a tentative national settlement between the parties, and the Court held, in effect, that while the national agreement remained open, the claimants remained directly interested even though the strikes were local in character. In the instant appeal, there was a final and binding national agreement which could not be reopened or renegotiated or otherwise affected by the outcome of any local dispute. It is, therefore, held that the claimants were not participating or directly interested in the labor dispute which caused their unemployment.

We now come to the critical issue for disposition of these appeals, namely, whether the claimants were "financing" the labor dispute which caused their unemployment. The problem posed in this appeal is unlike any other in the Michigan history of labor dispute appeals. This is a case of first impression and it is not likely that these particular facts will be repeated in the future.

When the Employment Security Act was initially passed by

the Michigan legislature in December, 1936, the language provided that an individual was considered directly involved in a labor dispute if it was established "that he is participating in or financing or directly interested in the labor dispute which caused the stoppage of work."

One of the first amendments by Act No. 347 of the Public Acts of 1937 enacted the proviso "that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this subsection . . ." It was not until 1963 that the parenthetical expression "in amounts and for purposes established prior to the inception of such labor dispute" was appended to the phrase "regular union dues."

We have no established judicial guidelines which control the disposition of the facts in this appeal or give us much clue as to what the statute means by "regular union dues" or what is meant by the phrase "prior to the inception of such labor dispute." It has been established that the earmarking of a portion of regular monthly union dues to a strike fund does not constitute financing under the statute. *Eleanor Apperley et al.* v *General Motors Corp.* 20 Mich. App. 374 (1969).

There are perhaps two distinct ways of looking at the structure of the language of subparagraph II. The first approach would be to say that it must be determined whether the dues in question were "regular" or not. If, on this first analysis they were not regular dues, then the rest of the language of the paragraph would be inapplicable and it could be concluded that the claimants financed within the meaning of the Act.

It is argued on behalf of claimants that the "emergency dues" of October and November of 1967 were mere increases in periodic dues and therefore "regular." However, the history and structure of the amendments to Article 16 of the UAW Constitution, suggests that the "emergency dues" were anything but regular. The word "emergency" itself indicates something unusual, out of the ordinary and different from the normal pattern or practice. Beyond the label the action of the

Union's Special Convention of October 8, 1967, was for the purpose of dealing with the critical depletion of the International Strike Fund. The "emergency dues" were designed to meet that crises on a temporary basis for a designated purpose and with a foreseeable termination.

We are referred to decisions of the National Labor Relations Board and a California court, which have held these emergency dues were not special assessments for the purpose of that litigation. These decisions, although of interest, are not necessarily controlling here. Neither is it necessary to hold that these dues were special assessments to take them out of the category of regular union dues for purposes of the Employment Security Act.

The alternative approach to this statutory language would be that the appended phrase with respect to "amounts and purposes" is in effect a legislative definition of what is contemplated as regular dues. This analysis would seem to be in part supported by the statutory history. This appears to have been the thinking of the Appeal Board in its decision in *Eleanor Apperly* v *General Motors Corp.*, MESC Docket No. B64-3775-33728 et al. The Board stated "likewise, the 'financing' of labor dispute has not been entirely defined but has by way of limitation been defined to exclude the payment of regular dues in amounts and for purposes established for such labor dispute as 'not financing' a labor dispute."

The Referee is inclined to the view that *if* the emergency dues in question occurred *prior* to the inception of the labor dispute and were for purposes established *prior* to the labor dispute, then it could be argued that such payments constituted regular dues within the meaning of the Act, and not financing of the labor dispute. The whole key to the statute is then one of time sequence — the relationship of the payment (emergency dues) to that point in time when "the labor dispute" had its inception. Therefore, it is necessary to consider

what is "the labor dispute" and how do we determine the point in time when such dispute had its "inception."

To summarize the essential facts in this appeal, in June of 1967, there was a notice of termination of the national and local agreements between the parties. In July of 1967, the collective bargaining began and continued for months thereafter at both national and local levels. In September, 1967, there was termination of the local and national agreements. During October and November of 1967, there was collection of the "emergency dues" pursuant to the amendment of the UAW Constitution from the claimants herein. In December, 1967, there was a national settlement. In January and February, 1968, there were local strikes which caused the unemployment of these claimants and those workers that struck received strike benefit assistance from the International's Strike Insurance Fund.

With relationship to these facts, what is the labor dispute and when did it begin. As noted above, the first paragraph of 29(8) was amended in 1963 to provide for a disqualification if the labor dispute was "in active progress." In 1936 when the statute first came into being, Michigan was among those states which had the active progress concept. In 1941, the Act was amended to incorporate the phrase "stoppage of work" and then in 1963, active progress returned. However, the phrase "active progress" is not mentioned in any of the paragraphs relating to direct involvement. There is, perhaps, some question as to whether the phrase "labor dispute" as used in these latter paragraphs, must be construed as being a labor dispute "in active progress." Whether it is or not, there is no definitive construction by the Supreme Court as to what active progress means.

However, the Supreme Court has dwelt with the meaning of the phrase "labor dispute." The Court in *Lillard* v *Employment Security Commission*, 364 Mich. 401 (1961), adopted the

definition of labor dispute found in the Michigan Labor Mediation Act as follows:

> "The terms 'dispute' and 'labor dispute' shall include but are not restricted to any controversy between employers and employees or their representatives . . . concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining or changing terms or conditions of employment . . ."

While it is true, as suggested by claimants' brief that *Lillard* did not end up specifically dealing with a labor dispute issue or applying the direct involvement provisions of the Act, it appears to the Referee that this definition is still recognized by the Court. The Brief for the claimants cites a portion of the Court decision in *General Motors Corp.* v *Robert H. Stinson et al.*, stating "the term labor dispute as used in Section 29(1)(b) cannot be read so broadly." 378 Mich. 110 at pg. 117. However, at this point of the Stinson decision, the Court goes on to state "It means *no more than* a controversy between employer and employees regarding hours, wages, conditions of employment, or recognition of a bargaining representative." (emphasis added)

The substance of the claimants' contention on this point is that a labor dispute, and particularly a labor dispute in active progress, did not occur until there was a strike in the plant which caused the unemployment of claimants. The employer's argument is that the labor dispute in the plants which caused the unemployment had its inception at the point when notice of termination of contracts was given and bargaining on new contracts began.

The Commission's Regulation 251, promulgated by the authority of Section 4 of the statute, undertakes to define regular union dues for purposes of financing under Subsection 29(8)(a) II as follows:

> "4. For the purpose of determining whether the payment of union dues shall be deemed financing under

Subsection 29(8)(a) II of the Act, the following provisions shall be applicable:

(A) The payment of regular union dues in amounts and for purposes established prior to any unemployment due to a labor dispute shall not be construed as financing even if such dues are used for a strike fund or other financing of the labor dispute.

(B) The payment of regular union dues which are established or increased after there is unemployment due to such labor dispute and which are used for the purpose of financing the current labor dispute shall be construed as financing the labor dispute.

(C) The payment of a special assessment into a fund established at any time and used for the purpose of financing the current labor dispute shall be construed as financing a labor dispute.

(D) The term 'special assessment', for the purpose of this regulation, means a payment made by a union member to his union to establish a fund for a specific purpose other than the payment of the ordinary administrative expenses of the union.

(E) The term 'regular union dues' for the purpose of this regulation and Subsection 29(8)(a) II of the Act, means any payment (other than a special assessment) made by a union member on a continuing basis to his union."

Of particular significance here is Subsection (a) which attempts to exclude from financing such dues that are paid in amounts and for purposes "established prior to *any unemployment* due to a labor dispute." It has frequently been said, and perhaps with some justification, that this agency does not become interested in any labor dispute until there is unemployment resulting therefrom. While this may be a truism, there are exceptions. It appears that the redeterminations which are the subject of these appeals were based on an application of the Commission's Regulation because certainly the "emergency dues" at issue were paid prior to the *unemployment* which is in question. However, the Referee must reach the conclusion that this test provided in the Commission's Regulation is not what is provided in the statute. The statute refers to "prior to the inception of the labor dispute." To the extent that the Commission's Regulation, although having the effect of law, goes beyond the plain language of the statute, such Regulation is repugnant as to the statute and cannot stand.

On record in this appeal it is found that the "labor dispute" for purposes of Subsection 29(8)(a) II of the Act had its "inception" long before that dispute manifested itself in the "local" strikes which caused the unemployment. Though there was only peaceful bargaining for many months after termination of the local agreements, there was a *controversy* between employer and employees as to the terms and conditions of employment. For the purpose of this Act there was a labor dispute. Further, the "labor dispute" had its inception *prior* to the collection of "emergency dues" in October and November, 1967. Therefore, such dues cannot be considered as "regular dues" as contemplated by the exception of the Act. It is held that such emergency dues constituted financing by the unemployed workers of the labor dispute which caused the unemployment. Claimants are subject to disqualification by virtue of their direct involvement in the labor dispute.

DECISION

The redeterminations with respect to these claimants are reversed.

Claimants' unemployment during the weeks ending February 3 and February 10, 1968, was due to a labor dispute within the meaning of Subsection 29(8)(a) of the Act and claimants were directly involved in such Subsection 29(8)(a) II of the

Act. Therefore, claimants are disqualified for benefits during the above weeks.

/s/ ROBERT B. HART
Referee

Mailed at Detroit, Michigan on June 29, 1971.

* * *

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE
(May 9, 1974)

A. G. BAKER, JR., and
L. R. FONDREN, et al,
Plaintiffs-Appellants,

vs.

GENERAL MOTORS
CORPORATION, et al,
Defendants-Appellees.

APPEAL
NO. 77
Judge Yeotis
OPINION

FACTS:

This matter is here on appeal from a decision of the Michigan Employment Security Appeal Board. It involves several thousand hourly rated employees of General Motors Corporation who became unemployed during certain designated periods in January and February of 1968, as a result of local strikes in plants other than their own.

The issue involved herein is whether these employees should be disqualified under provisions of Subsection 29(8)(a) II of the Michigan Employment Security Act, for having financed the labor dispute which caused their unemployment.

The Referee and the Michigan Employment Security Appeal Board both reversed determination allowing benefits without disqualification, and found that these Claimants were not eligible for unemployment benefits.

The sole basis for the finding of ineligibility was that the

Claimants were directly involved in a labor dispute in active progress in that they financed the labor dispute by the payment of "emergency dues" as established on October 8, 1967, which dues were not the payment of regular union dues and which "emergency dues" were not for purposes established prior to the inception of the labor dispute in active progress in June of 1967.

The controversy, which is the subject of this case, arose out of the negotiations in 1967 for a new contract in the auto industry. In June, 1967, the UAW served a sixty (60) day notice of intention to terminate its national agreement with General Motors upon the corporation and also upon every GM plant in which the Claimants involved with this dispute, were employed. On July 10, 1967, the UAW and GM entered into negotiations concerning the national agreement. In August, 1967, the UAW took a strike vote among its members seeking authorization to strike, if necessary, on national and local issues, which authorization was received. On September 6, 1967, the national agreement between GM and UAW expired as did all the local plant agreements.

A special convention was held by the UAW in Detroit, Michigan, in October, 1967, because of an "emergency" created by a strike then in progress against the Ford Motor Company, the target company in the auto industry for that year. One of the express purposes of the special convention was to modify the dues structure specified in Article 16 of the UAW constitution, which since 1964 had provided that regular membership dues were to be $5.00 per month with $3.75 going to the union administrative fund and $1.25 going to the union strike insurance fund. By means of a constitutional amendment adopted at the special convention, the UAW raised the amount going to the strike fund as of October 8, 1967, and continuing during that "emergency" to $11.25 per month or $21.25 per month depending on the average wage level in the particular plant at which the member was employed.

The Claimants, herein, paid "emergency dues" during October and November, 1967, a portion of which was eventually placed in the International Union Strike Insurance Fund.

A national settlement was reached at GM on December 15, 1967, ratified on December 28, 1967, and became effective January 1, 1968. The national agreement permitted the UAW to authorize strikes to be conducted at the local plants of GM over certain unresolved local issues. On January 10, 1968, the UAW gave notice of its intent to authorize strike action at five locations in Michigan and at five locations in other states. As a result of these local strikes, which were carried out in the months of January and February, 1968, the plants, in which the Claimants were employed, experienced shutdowns or curtailments of production which caused their unemployment.

The Benefit Section of MESC made a redetermination that the Claimants were eligible for benefit in all respects. The Referee Section of the MESC reversed that redetermination and the Appeal Board upheld the decision of the Referee Section finding the Claimants ineligible for unemployment benefits under Section 29 of the Michigan Employment Security Act.

The sole statutory basis relied upon by the Appeal Board for denial of benefits to these Claimants is Subsection 29(8)(a) II of the Michigan Employment Securty Act, MCLA 421.1, et seq., which states:

> "(8) Labor Dispute. An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to a shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with

> such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.
>
> (a) For purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
>
> * * *
>
> II. He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph, or"
>
> * * *

The Appeal Board stated that the Claimants cannot be found to be directly involved through either, "participating in" or being "directly interested in" the labor dispute which resulted in local strikes. The Appeal Board did find, however, that the Claimants were "financing" the labor dispute by the payment of "emergency dues" as established October 8, 1967.

QUESTION:

Did the Claimants, by the payment of "emergency dues" in October and November, 1967, finance the labor dispute which caused their total or partial unemployment?

CONCLUSION:

The labor dispute which caused the Claimants' unemployment involved local strikes at several General Motors' plants. These local strikes did not occur until January, 1968. The "emergency dues" were established in October, 1967, and were paid during October and November of that year.

In its own interpretation of Subsection 29(8)(a) II, the Michigan Employment Security Commission has determined that dues established prior to any unemployment due to a

labor dispute cannot be considered financing. This interpretation, of the aforementioned subsection, may be taken from the Michigan Employment Security Commission's Regulation 251. An application of this interpretation to the facts of the present case would result in a finding of eligibility of the Claimants for unemployment benefits.

The labor dispute which caused the unemployment of these Claimants did not occur until January, 1968; therefore, the constitutional amendment establishing higher dues in October, 1967, was passed by the UAW prior to the labor dispute, and cannot disqualify the Claimants under Subsection 29(8)(a) II of the Michigan Employment Security Act.

The Claimants, by payment of "emergency dues" in October and November, 1967, did not finance the labor dispute which caused their unemployment.

AUTHORITY:

The Court is bound to accept findings of fact made by the Appeal Board if they are supported by the great weight of the evidence. This limitation does not, however, preclude the Court from reviewing the Appeal Board's application of the law or its reasoning process. *Graham* v *Sanders,* 11 Mich App 361 (1968).

The facts in the present case are not in dispute, however, the application of the law to those facts is.

Section 4 of the Michigan Employment Security Act provides that the Michigan Employment Security Commission may promulgate regulations to carry out provisions of the Act. It states in part:

> "The commission is hereby authorized and empowered to promulgate such rules and regulations, as it deems necessary, not inconsistent with the provisions of this act, to carry out provisions of this act."

The MESC acting pursuant to this section has adopted Regulation 251 which provides:

> "4. For the purpose of determining whether the payment of union dues shall be deemed financing under Subsection 29(8)(a) II of the act, the following provisions shall be applicable:
>
> (a) The payment of regular union dues in amounts and for purposes established prior to any *unemployment* due to a labor dispute shall not be construed as financing even if such dues are used for a strike fund or other financing of the labor dispute." (emphasis supplied).

The facts show that the dues were established in October, 1967, and paid during October and November, 1967, which was two months before any unemployment due to the labor dispute occurred.

The Michigan Court of Appeals has held that the Michigan Employment Security Act, being remedial in purpose and nature, must be liberally construed so as to allow benefits, and that disqualifying provisions be construed narrowly. In *Salenius* v *Michigan Employment Security Commission*, 33 Mich App 228 (1971), the Court said:

> "Since the Employment Security Act is remedial Legislation, it is to be construed liberally to achieve its purpose.
>
> * * *
>
> In keeping with the purpose of the Employment Security Act, the trend is to construe narrowly the disqualification provisions of section 29."

For purposes of the disqualification provision of Subsection 29(8)(a) II, the term "labor dispute in active progress" should not be so broadly construed as to include bargaining conducted in good faith when it is a fluid state and where no impasse has occurred.

The Indiana Appellate Court in *International Steel Co.* v *Review Board of the Indiana Employment Security Division*, 252 NE 2d 848 (1969) held that no labor dispute existed during good faith negotiations. The Court there said:

> "Further the Review Board's finding that good faith

negotiations between the employer-apellant and representatives of the employees-appellees, where the facts showed the bargaining process to be in a fluid state, thereby precluded the existence of a labor dispute which would otherwise disqualify the benefits otherwise permitted by § 1504 of the act, is fully supported by the authority of *Bootz Mfg. Co.* v *Rev. Board of Ind. Emp. Sec. Div.* (1968), Ind. App., 237 NE 2d 597, 238 NE 2d 472 (transfer denied)." In *Bootz*, the Indiana Court held:

"We conclude that good faith negotiations between representative of management and labor, where the facts show that the bargaining is in a fluid state and no impasse has occurred, gives neither party the right to declare a labor dispute.

To hold otherwise would be to defeat the purpose of the law. Such an interpretation would defeat the objective of contract negotiation in all industries. To promote the general welfare it is necessary and in the interest of public policy to encourage good faith collective bargaining at all time. If we were to interpret every difference of opinion between employer and employee as a labor dispute we can perceive a situation where no one could receive unemployment benefits and labor-management relations would be in chaos."

For the above reasons, the decision of the Michigan Employment Security Appeal Board denying unemployment benefits to the Claimants, is reversed.

Appellants' counsel shall draw an Order in conformity with the Opinion of the Court and present it for the Court's signature within twenty (20) days.

By: /s/ THOMAS C. YEOTIS,
CIRCUIT JUDGE
DATED: May 9, 1974.

* * *

WAYNE CIRCUIT COURT OPINION
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF WAYNE
(May 15, 1974)

KENNETH R. COLLIER and
JOHNNY S. ROBINSON, et al
Plaintiffs-Appellants,

-vs- No. 211,596

GENERAL MOTORS
CORPORATION, et al
Defendants-Appellees.

* * *

OPINION

On September 1, 1967 the United Auto Workers announced that its executive board had selected Ford as the target company for initial contract negotiations and possible strike. A national strike began at Ford Motor Company on September 7, 1967.

Early in October of 1967, the regular convention of the UAW voted to increase the dues to help replace the Strike Fund which was nearly depleated due to the Ford strike, still in progress. The claimants were required to pay these dues under the UAW Constitution and under the union shop clause in the contract with General Motors at that time. The increased dues were paid in during October and November, 1967 only.

On October 22, 1967 the UAW and Ford announced they had reached a settlement. The UAW then announced that Chrysler would be the next member of the "big three" to undergo contract negotiation. A national agreement, very similar to that reached with Ford, was made effective on November 9, 1967.

The UAW then began contract negotiations with General Motors. The national agreement became effective on January 1, 1968.

General Motors stated in their annual report filed with the Securities and Exchange Commision and given to all shareholders:

> "On December 15, General Motors and the United Automobile Workers Union reached agreement on a . . . national contract . . . without a national strike. . . ."

During the months of January and March certain strikes took place at General Motors Plants outside the Wayne County area (most of which were out of state). The claimants herein were all involuntarily laid off from their jobs at the Wayne County General Motors Plants. They were available for work and seeking work but were laid off due to the partial slowdown engineered by GM to compensate for the strikes in other plants. The claimants herein all were at the bottom of the seniority lists. None of the claimants laid off were participating in the strikes in the sense of actually striking, picketing or directly contributing to another striker's economic benefit. The Wayne County workers were not directly interested in the issues causing the strikes in the other plants. Even if the strikes taking place at the other plants were settled purely along guidelines, they would have no beneficial impact whatsoever for the Wayne County Workers.

General Motors urges that the claimants were disqualified from receiving unemployment compensation benefits relying on MSA 17.531(8):

> "An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a ***labor dispute in active progress,*** or to shutdown or start-up operations caused by such labor dispute, (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any ***other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit.*** No such individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.
>
> (a) For the purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
>
> I. At the time or in the course of a labor dispute in the establishment in which he was then employed, he shall in concert with one or more employees ***have voluntarily stopped*** working other than at the direction of his employing unit, or
>
> II. He is ***participating in, or financing or directly interested in the labor dispute*** which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph, or,
>
> III. At any time, there being no labor dispute in the establishment or department in which he was employed, he shall have voluntarily stopped working, other than at the direction of his employing unit, in sympathy with employees in some other establishment or department in which a labor dispute was then in progress, or,
>
> IV. His total or partial unemployment is due to a labor dispute which was or is in progress in any department or unit or groups of workers in the same establishment."

Clearly, subsection I does not apply to the claimants herein. They did not voluntarily stop working.

General Motors claims that the claimants "financed" the strike, borrowing the word from subsection II. The only way this could be upheld would be to look at the Ford strike the previous fall as being functionally integrated with the quickie GM strikes the following year. The special dues were paid only during October and November, and cannot be imputed to the

following year as GM would have the court do. The GM strikes were not contemplated at the time the special dues were paid. The dues increase was used to revitalize the strike fund during the Ford strike, and for no more than that. The increased dues were regular dues and were legal, *Cole* v *Local 509 UAW,* 68 LRRM 2097.

The court also relies on MESC Regulation 251 which provides that union dues paid prior to the unemployment of claimants due to a labor dispute is not financing within the terms of the statute here in question.

The claimants were not, in the opinion of this court, participating in the strike at another plant. In this respect this court affirms the findings and conclusions of the M.E.S.C. Referee and of the Appeal Board. The principal agent theory under which GM propounds was rejected in *Park* v *Employment Security Commission,* 355 Mich 103 (1959) at 111.

Further, the claimants were not directly interested in the outcome of the labor disputes at the other plants. From the evidence, they could not be reasonably expected to effect the working conditions of the claimants.

Following the guidelines set forth in 29(8)(b) of the act, there was no custom or obligation to extend to the members of the claimant's class in their establishment the terms and conditions made for the workers involved in the striking plant; the purpose of the dispute was not to obtain a change in terms or conditions of members of the claimant's grade or class in their own Wayne County establishments; and lastly, the collective bargaining agreements at the claimant members' plants were not all open. There was a final and binding national agreement which could not be reopened or renegotiated or otherwise effected by the outcome of any local dispute. It is, therefore, held that the claimants were not directly interested in the labor disputes causing their unemployment. Again in this respect, this court affirms the findings and conclusions of the M.E.S.C. Referee and of the Appeal Board.

The following hurdle is the last one the claimants must successfully overcome in order to be entitled to the benefits: the disqualification in subparagraph IV. The disqualifications to the act must be very narrowly construed in order to abide by the intent of the legislature in enacting Unemployment Compensation Laws. In order for the claimants to be disqualified by subparagraph IV it must be solely caused by the labor disputes occurring elsewhere.

The claimants were the chosen few to be laid off, due in no small way to their seniority at the plants. Seniority provisions have been held to be non-disqualifying factors, *Lloyd Manufacturing Company* v *Appeal Board, CCH Unemployment Insurance Reporter,* Paragraph 8378, page 25, 660.

Bratton Tool & Die v *Palise, et al,* Ingham Circuit Court #9753-C held that:

> "Once there was some work in the establishment the operation had started-up. The continued unemployment of claimants was then due to not enough work and to the seniority clause of the collective bargaining agreement."

These benefits were due the unemployed claimants. The court cannot hold that the contract between the union and the employer, GM, bargained away the rights of the employees to collect unemployment compensation.

Another factor in the lay offs were the economic situations GM chose to become involved with in the various plants. Much of the business at the Wayne County Plants was dependent upon parts supplied from other, then struck, plants. GM could have purchased the necessary parts on the open market, but chose not to do so.

In order to uphold the finding from below, it must appear that the strike alone was the reason for the claimants unemployment and such was not the case. It is the opinion of this court that the claimants herein are entitled to unemployment

compensation for the two periods during which they were unemployed in early 1968.

An appropriate order in conformance to the foregoing shall be submitted for the courts signature.

By: /s/ JAMES N. CANHAM
Circuit Judge

May 15, 1974.

* * *

INGHAM CIRCUIT COURT OPINION
STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF INGHAM
(April 24, 1974)

ROBERT J. SEIDELL and
JOHN F. SCHAEFER, et al.,
Plaintiffs,
-vs-
GENERAL MOTORS
CORPORATION, and
THE MICHIGAN
EMPLOYMENT SECURITY
COMMISSION,
Defendants.

OPINION
No. 73-14581-AE

* * *

This case has been argued orally before this Court, briefs presented and the Court being fully advised in the matter makes the following findings and rulings.

A careful review of the record and briefs indicates a problem of interpretation and application of the facts to Michigan Employment Security Commission Act, Section 29(8):

> "An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute *in active progress,* or to shut-down or start-up operations caused by such dispute * * * * * * * * * * No individual shall be disqualified under this subsection 29(8) if he is not *directly involved* in such dispute.

> "(a.) For the purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
>
> * * *
>
> "(II) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. *The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph* * * * *" (Emphasis added)

The facts of this case appear to be undisputed and so this Court makes no findings in this area and the determination of these facts by the hearing referee and appeal board are accepted in full. A reading of the record indicates that there is ample evidence to substantiate such findings of fact.

A reading of the record and briefs indicate to this Court that MESA Section 29(8) does not contravene the Federal Statutes or the Michigan, and U.S. Constitutional safeguards afforded people of our Nation.

This whole case boils down to the application of the facts to Section 29(8). If the facts are determined one way, the claimants are entitled to benefits; if they are interpreted the other way, the claimants are not entitled to benefits.

It was interesting to the Court to note under "Legal Issues" of the Outline and Summary of Arguments by Plaintiffs-Appellants (claimants) the following language:

> "There are two major legal issues in the instant case which we will later subdivide for purposes of convenience:
>
> "A. *Must* Section 29(8) be construed to deprive (claimants) of Statutory benefits of about $280 a month these involuntarily out of work claimants who had no remuneration (not even strike fund benefits) during their layoffs?
>
> "B. If Section 29(8) must be construed that way, does it impede Federal law?"

Legal Issues A is worded so that this Court would have to review the facts of the case to answer it. The wording of Section 29(8) is clear to this Court. If an individual is unemployed due to a labor dispute in active progress, etc. and further on the section states he shall receive no benefits if he is participating in or financing or directly interested in the labor dispute which causes his unemployment. For a court to determine that it must evaluate factual evidence or review the facts in the case if it is appealed as it has been in this case. Yet, both sides indicated to this Court that there's no real dispute as to the factual findings in this case. A reading of the briefs and record on appeal confirms these statements.

The appellants are asking this Court to make a finding of fact that they were not involved in and/or not financing a labor dispute. So in reality the appeal is from a finding of fact and not for a legal issue involving the interpretation of Section 29(8). Based upon the law of Michigan regarding appeals from an administrative agency a court reviews the record, and if there's reliable and substantial evidence in that record to substantiate such a finding said court will not substitute its judgment for the judgment of the trier of the facts (even though said court may have reached a contrary finding if it had been the trier of the fact.) So in this case there is evidence to substantiate the referee's and appeal boards findings and hence this Court will not substitute its judgment for theirs in applying the facts to Section 29(8).

As to B Section 29(8) is clear and does not in this Court's opinion impede or violate the Federal or Constitutional law of our country. This Court, based on the above, sustains the findings and rulings of the referee and the appeal board.

An order may enter in conformity with this opinion.

By: /s/ JAMES T. KALLMAN,
Circuit Judge

April 24, 1974.

* * *

DECISION OF THE COURT OF APPEALS
STATE OF MICHIGAN
COURT OF APPEALS
(March 28, 1977)

A. G. BAKER, JR., and
L. R. FONDREN, et al,
Plaintiffs-Appellees,
-vs-
GENERAL MOTORS
CORPORATION,
Defendant-Appellant,
and
MICHIGAN EMPLOYMENT
SECURITY COMMISSION,
Defendant.

No. 24083

* * *

BEFORE: T. M. Burns, P.J. Kelley and D. F. Walsh, J.J.

In the cases of *Baker* v *General Motors* and *Collier* v *General Motors,* Nos. 24083 and 24084, the company appeals from judgments of the Genesee and Wayne County circuit courts, respectively, which held that the plaintiffs were entitled to unemployment compensation. In *Seidell* v *General Motors,* No. 24150, the plaintiffs appeal from a judgment of the Ingham County circuit court which held that plaintiffs were disqualified for such benefits. By orders dated January 21, 1976, we granted the parties' applications for leave to appeal and consolidated the cases for review.

The facts are essentialy undisputed. On September 6, 1967, at 11:59 p.m. the 1964 national agreement between General Motors and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter the "International") expired, as did agreements between individual company plants and union locals. In June 1967 the International Union notified GM of its intention to terminate the national and local agreements. On July 10, 1967,

the International and the company commenced negotiations on the national agreement. During the week of August 27, a vote was taken of the UAW membership and strikes were authorized, if necessary, on national and local issues. Negotiations continued beyond the expiration date of the existing agreements until December 15, 1967, when a contract settlement was reached. As part of the settlement, the company agreed to waive the provision of the national agreement prohibiting a strike with respect to those plants at which the International authorized a strike over local issues, provided the company was notified five working days in advance of the union's intention to strike. The agreement was ratified on December 28, 1967. Union members continued in their employment during the course of negotiations on a new national contract.

On January 10, 1968, pursuant to the agreement, the International gave the company 10 days notice of its intention to authorize strikes at five Michigan plants and five out-of-state plants. These authorizations were based upon the strike vote taken in August. Later that month strikes occurred at foundries in Saginaw, Michigan; Defiance, Ohio; and Tonawanda, New York.[1] Following the strikes, the plants employing the UAW members involved in these lawsuits experienced shutdowns or curtailments of production and the members became unemployed.

Union members filed for unemployment compensation which claims were approved by the Michigan Employment Security Commission upon redetermination. The company appealed to a hearing referee who reversed the commission's decision. The referee found that the claimants were disqualified under §29(8)(a)(II) of the Michigan Employment Security Act, MCLA 421.1 *et seq;* MSA 17.501 *et seq,* because they had financed the

[1]The Chevrolet-Flint Manufacturing and the Chevrolet V-8 Engine Plants in this state, as well as assembly plants at Framingham, Massachusetts; Lordstown, Ohio; Van Nuys, California; and Atlanta, Georgia, were also struck.

labor dispute which caused their unemployment. The Michigan Employment Security Appeal Board upheld the referee's determination which decision in turn, was affirmed by the Ingham County circuit court and overturned by the circuit courts of Genesee and Wayne Counties.

At issue in the instant case is the construction and application of MESA §29(8)(a)(II). At the time of claimants unemployment that section provided:

> "(8) An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by such labor dispute, in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress, or to shutdown or start-up operations caused by such labor dispute, in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.
>
> "(a) For the purposes of this subsection 29(8), no individual shall be deemed to be directly involved in a labor dispute unless it is established that:
>
> * * *
>
> "(II) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph. . . ." MCLA 421.29(8)(a)(II); MSA 17.531(8)(a)(II).

The 1964 constitution of the International provided for regular monthly membership dues of $5.00 of which $3.75 was

allocated to the union administrative fund and $1.25 to the union strike fund. On October 8, 1967, while a strike was in progress at Ford Motor Company, the International held a special convention in Detroit, one of the major purposes of which was amendment of the dues structure. The convention amended article 16 of the constitution to provide for "emergency dues" commencing with October 8, 1967, and continuing "during the current collective bargaining emergency as determined by the International executive board and thereafter, if necessary, until the International Union Strike Fund has reached the sum of twenty-five million dollars ($25,000,000). . . ." During the emergency, administrative dues consisted of $3.75 per month and strike fund dues consisted of $11.25 or $21.25 per month depending upon the average hourly wage at the member's plant. After termination of the emergency or achievement of the $25,000,000 goal, union dues were to consist of two hours straight time per month. The local union was to get 40% of the dues and the remaining 60% was to be divided evenly between the administrative and strike funds of the International.

At the hearing before the referee, counsel stipulated that: (1) the claimants had paid emergency dues for October and November, (2) that the dues allocated by the constitutional amendment to the strike insurance fund were remitted by the local unions and placed by the International in the strike fund, and (3) UAW members on strike at the three foundries were paid benefits from the International's strike insurance fund.

The hearing referee found that the claimants' unemployment was the result of a labor dispute in active progress at functionally integrated plants. While the referee found that the claimants did not participate in the labor dispute and were not directly interested, he did hold that the claimants financed the dispute by the payment of the dues set by the UAW convention of October 8. The referee defined "regular union dues" as dues the amount and purposes of which were set prior to

inception of a labor dispute: he found that the labor dispute in the present case had its inception after termination of local agreements and negotiations of future terms, since a controversy then existed.

The Appeal Board agreed with the referee as to the cause of plaintiffs' unemployment, the functional integration of the plants at which the strikes occurred with those at which plaintiffs were employed, and the fact that plaintiffs neither participated in nor were directly interested in such disputes. The Board also upheld the referee's determination that plaintiffs had financed the labor dispute causing their unemployment, on a different basis however. The Board found that the dues established by the convention were neither regular nor were they set in purposes and amounts prior to inception of the labor dispute, which the Board found had commenced in June, 1967.

On appeal, the Ingham County circuit court held that the Appeal Board's decision regarding plaintiffs' direct involvement in the labor dispute was a factual question. As the court found the Board's determination supported by the record, it refused to substitute its judgment for that of the Board. The Genesee County circuit court found that as the emergency dues were paid prior to the strikes which resulted in claimants' unemployment, their payment did not constitute financing a labor dispute. The court held that "a labor dispute in active progress" should not be so broadly construed as to include good faith bargaining prior to an impasse. The Wayne County circuit court held that claimants had not financed the dispute as the 1967 Ford strike was not functionally integrated with the 1968 General Motors strikes, the General Motors strikes were not contemplated at the time the special dues were paid, and the dues were used only to revitalize the strike fund during the Ford strike. The court also refused to disqualify claimants on the basis that their unemployment was not caused solely by the labor dispute. The court found that

other factors, consisting of seniority provisions in local collective bargaining agreements and General Motors' failure to buy parts on the open market, also contributed.

On appeal, General Motors attacks the decision of the Genesee County and Wayne County circuit courts as violative of the purposes of the MESA to provide relief from unemployment in a manner which avoids encouraging work stoppages. Seeking reversal of the Ingham County circuit court decision, claimants primarily contend that the dues paid in the instant case did not constitute financing the labor dispute as a matter of law.[2]

The disqualifying provision[3] under consideration originally provided simply that one "participating in or financing or directly interested in the labor dispute which caused the stoppage of work" was directly involved in the dispute. 1936 PA Ex Sess 1. By 1937 PA 347, the legislature added: *"Provided, however,* That the payment of *regular* union dues shall not be construed as financing a labor dispute. . . ." (Emphasis supplied.) The parenthetical phrase "in amounts and for purposes established prior to the inception of such labor dispute" which is presently contained in the statute was added by 1963 PA 266.

---

[2]Plaintiffs also argue that the Ingham County circuit court unduly restricted its review of the Appeal Board's decision. We agree.

An Appeal Board determination is reviewable for questions of law or fact: it may only be reversed if contrary to the law or unsupported by competent, material and substantial evidence on the whole record. Const 1963, art 6, § 28; MCLA 421.38; MSA 17.540. Where no dispute exists as to the underlying facts, the question presented is one of proper application of the law. *Thomas* v *Employment Security Commission,* 356 Mich 665; 97 NW2d 784 (1959), *Graham* v *Fred Sanders Co,* 11 Mich App 361; 161 NW2d 601 (1968). In the instant case, therefore, the Board's determination that claimants were directly interested in the labor dispute causing their unemployment was reviewable as a question of law.

[3]Generally, before discussing whether an individual is directly involved in a labor dispute so as to be disqualified for benefits, the basic provision of § 29(8) must be applied, that is, it must first be determined, in the present case, whether claimants' unemployment was due to a labor dispute in active progress at a functionally integrated plant. *Park* v *Employment Security Commission,* 355 Mich 103; 94 NW2d 407 (1959), *Scott* v *Budd Co,* 380 Mich 29; 155 NW2d 161 (1968). Claimants do not challenge the findings made by the hearing referee and Appeal Board that the struck plants were functionally integrated with the plants at which they were employed. They do, however, argue that their unemployment was not the result of such labor disputes but was caused by General Motors management decision and seniority provisions in local collective bargaining agreements which determined the order of layoff. In this regard, claimants would have this court adopt the opinion of the Wayne County circuit court.

In order for a claimant to be disqualified from receiving unemployment benefits because of a labor dispute, a causal connection between the dispute and the claimant's unemployment must be established. *Scott* v *Budd Co,* supra. An employer seeking exemption from payment of unemployment benefits on the ground that the unemployment was due to a labor dispute in active progress bears the burden of proving it is entitled to such an exception. *Salenius* v *Employment Security Commission,* 33 Mich App 228; 189 NW2d 764 (1971). The issue is one of fact. *Bedwell* v *Employment Security Commission,* 367 Mich 415; 116 NW2d 920 (1962), *See, Scott* v *Budd Co., supra, Michigan Tool Co* v *Employment Commission,* 346 Mich 673; 78 NW2d 571 (1956). In the present case, the Appeal Board's finding that claimants' unemployment was due to a labor dispute in active progress at a functionally integrated plant is supported by competent, material, and substantial evidence on the whole record. MCLA 421.38; MSA 17.540. That being the case, the Board's finding is conclusive upon the circuit court and this court.

In excluding the payment of *"regular"* union dues from the §29(8) disqualification in 1937, the legislature left within the terms of the section every type of union assessment other than *"regular"* union dues. The express mention of one thing in a statute implies the exclusion of other similar things. *Stowers* v *Wolodzko,* 386 Mich 119; 191 NW2d 355 (1971), *Citizens Mutual Co* v *Central National Insurance Co of Omaha,* 65 Mich App 349; 237 NW2d 322 (1975). Hence, extraordinary union dues still constituted financing a labor dispute if used for such purposes: The addition of the qualifying language in 1963 did not expand the scope of the exception: it further limited it. Presently, therefore, payments to a union which support a strike evade the direct involvement test of §29(8) only if they were both: (1) regular, and (2) in amounts and for purposes established prior to the inception of the labor dispute. To adopt the

conclusion that union dues do not constitute financing only if the amounts and purposes of such dues are established prior to the dispute would render the word "regular" meaningless. Every word in a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible. *Stowers* v *Wolodzko, supra, Chrysler Corp* v *Washington,* 52 Mich App 229; 217 NW2d 66 (1974).[4]

The Michigan Employment Security Act is intended to provide relief from the hardship caused by involuntary unemployment. As the purpose of the Act is remedial, it is to be liberally construed. MCLA 421.2; MSA 17.502; *Noblit* v *The Marmon Group,* 386 Mich 652; 194 NW2d 324 (1972); *Salenius* v *Employment Security Commission,* 33 Mich App 228; 189 NW2d 764 (1971). Conversely, the disqualification provisions of § 29 are to be read narrowly. *Salenius* v *Employment Security Commission, supra.* Nevertheless,

> "All interested parties who are involved in a claim for unemployment compensation * * * must be dealt with on an impartial basis. The unemployment compensation fund should never be used to finance claimants who are directly involved in a labor dispute, nor should it ever be denied to claimants who are legally entitled to receive benefits. * * * None of the money accumulated in this fund should ever be disbursed for the purpose of financing a labor dispute nor should it be illegally withheld for the purpose of enabling an employer to break a strike. The State of Michigan, in so far as this act is concerned, must remain neutral in all industrial controversies." *Lawrence Baking Co* v *Unemployment Compensation Commission,* 308 Mich 198, 213; 13 NW2d 260, 265; 154 ALR 660, 669 (1944), *cert den,* 323 US 738; 65 S Ct 43; 89 L Ed 591 (1944).

[4]The two step approach which this court adopts is further supported by the regulations of the Michigan Employment Security Commission implementing MESA § 29(8)(a)(II). 1964-65 AACS R. 421.251(4). See, *Magreta* v *Ambassador Steel Co,* 380 Mich 513; 158 NW2d 473 (1968).

If every assessment made "for purposes established prior to the inception of [a] labor dispute" were to be considered "regular" dues as that term is used in §29(8)(a)(II), special assessments could be levied on all members of an international union for the express purpose of financing anticipated local strikes without affecting the right of non striking contributors to receive unemployment benefits should they become unemployed as a result of the local strike. Such an interpretation would destroy the state's neutrality in the controversy and abrogate the expressed purpose of the Act to aid only those unemployed because of conditions over which they have no control.

In exercising the judicial function of determining legislative intent, courts must interpret words according to their ordinary usage and in the sense in which they are understood and employed in common language. *Chrysler Corp* v *Washington, supra.* Webster's New Collegiate Dictionary (1973), p 974, states that "regular" is synonymous with "normal", "typical" and "natural" to the extent that they all mean "being of the sort or kind that is expected as usual, ordinary, or average". The assessment made by the union against its members in October 1967 was not regular. According to the 1964 UAW constitution, minimum monthly union dues were $5.00, with $3.75 allocated to the union administrative fund and $1.25 to the strike insurance fund. Under the amendment of October 8, administrative dues remained the same. Dues allocated to the strike fund, however, were increased nine-fold. The amendment provided that the schedule was to remain in effect "during the current collective bargaining emergency" after which a reduced schedule would become effective. Clearly, the dues schedule adopted October 8 was intended to be only a temporary measure and cannot be termed regular, usual or ordinary.[5]

[5]The Wayne County circuit court itself termed the dues "special".

Subsequent events support the temporary nature of the provision. Union members paid the increased dues only during October and November when the reduced schedule went into effect.[6]

By stipulation, claimants' counsel admitted that the emergency dues collected were used to subsidize the foundry workers on strike. We necessarily find, therefore, that claimants were directly involved in the labor dispute causing their unemployment, as defined by §29(8)(a)(II), and are thus precluded from receiving benefits.[7]

Plaintiffs' remaining contentions are without merit.

The judgment of the Ingham County circuit court is affirmed; the judgments of the Genesee County and Wayne County circuit courts are reversed.

---

[6]Because we find the dues assessed in the instant case extraordinary, we have no reason to decide when the labor dispute causing plaintiffs' unemployment had its inception.

[7]Our decision has no effect upon the ability of a union to designate a portion of its regular monthly dues as representing a contribution toward a strike insurance fund without disqualifying its members from unemployment compensation for financing a labor dispute in which they are in no other way directly involved. *Burrell* v *Ford Motor Co,* 386 Mich 486; 192 NW2d 207; 62 ALR 3d 304 (1971).

APPELLANT'S

BRIEF

No. 85-117

In The

Supreme Court of the United States

October Term, 1985

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' BRIEF

FRED ALTSHULER
Altshuler and Berzon
177 Post Street, Suite 600
San Francisco, CA 94108
(415) 421-7151

JORDAN ROSSEN
Counsel of Record
RICHARD W. MCHUGH
DANIEL W. SHERRICK
8000 E. Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

Counsel for Appellants

APPEAL DOCKETED JULY 22, 1985
JURISDICTION NOTED OCTOBER 15, 1985

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

51pp

QUESTION PRESENTED

DID THE MICHIGAN SUPREME COURT ERR IN HOLDING THAT CONGRESS INTENDED TO TOLERATE THE CONFLICT IT FOUND TO EXIST BETWEEN THE NATIONAL LABOR RELATIONS ACT AND ITS APPLICATION OF STATE LAW WHICH DISQUALIFIED INDIVIDUALS FROM ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION SOLELY BECAUSE THOSE INDIVIDUALS PAID UNION DUES?

PARTIES TO THIS PROCEEDING

Appellants are the named individuals and others who brought class action appeals under a Michigan law on behalf of themselves and others to three Michigan circuit courts and whose cases were consolidated by the Michigan Supreme Court.

General Motors Corporation is the appellee. The MESC, a statutory appellee under Michigan law, has not appeared.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-117

In The

Supreme Court of the United States

October Term, 1985

A. G. BAKER, JR., KENNETH COLLIER,
and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' BRIEF

Appellants A. G. Baker, Kenneth R. Collier and Robert J. Seidell, whose cases were consolidated by the Michigan Supreme Court, appealed on July 22, 1985 from the final judgment of the Michigan Supreme Court dated January 17, 1985 and the denial of rehearing by the Michigan Supreme Court, dated April 23, 1985, holding that the National Labor Relations Act does not preempt Michigan's interpretation of the Michigan Employment Security Act, thereby denying unemployment compensation to appellants solely because these individuals paid certain increased monthly union dues.

This Court noted Jurisdiction on October 15, 1985.

OPINIONS BELOW

The Jurisdictional Statement includes: the denial of rehearing by the Michigan Supreme Court (J.S. 143a); the opinions of the Michigan Supreme Court (J.S. 6a-75a; 420 Mich. 463) and (J.S. 75a-98a; 409 Mich. 639) and the plurality advisory opinion of the Employment Security Board of Review on remand (J.S. 99a-142a).

The Joint Appendix includes: the MERC Determination (J.A. 160a-166a); the MESC Referee Decision (J.A. 167a-186a); the Genesee, Wayne and Ingham County Circuit Court Opinions (J.A. 186a-200a) and the Michigan Court of Appeals Decision (J.A. 201a-210a; 74 Mich. App. 237).

JURISDICTION

The judgment of the Michigan Supreme Court, holding that the National Labor Relations Act does not preempt Michigan's interpretation of the Michigan Employment Security Act, was entered on January 17, 1985. A motion for rehearing was denied on April 23, 1985. A notice of appeal was filed in the Michigan Supreme Court on July 18, 1985 and docketed in this Court on July 22, 1985. Jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1257(2).

This Court noted jurisdiction on October 15, 1985.

STATUTORY PROVISIONS INVOLVED

The following statutes will be set out in relevant part in the appendix to this Brief: Sections 7, 8(a)(3), 8(b)(2) and 8(d) of the National Labor Relations Act, 29 U.S.C. § 157 and § 158(a)(3), (b)(2), and (d); Section 101(a)(3),

Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(3); Section 3304(a)(5) of the Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(5); and Sections 2, 28 and 29(8)(a)(ii), Michigan Employment Security Act, Mich. Comp. Laws §§ 421.2, .28 and .29(8).

STATEMENT OF THE CASE

Appellants are non-striking Michigan General Motors (GM) employees and members of the International Union, UAW, who were held to be disqualified from unemployment compensation benefits solely because they had paid certain uniformly required lawful union dues.[1]

The case has its genesis in the events surrounding the 1967 automobile and agricultural implement industries' collective bargaining negotiations. In June 1967, the International Union, UAW and several major employers exchanged notices to bargain pursuant to Section 8(d) of the NLRB, 29 U.S.C. § 158(d). (J.S. 79a, J.A. 187a)[2] The automobile contracts expired on September 9, 1967. (J.S. 79a) After expiration of those contracts, the UAW called national strikes against Ford Motor Company and Caterpillar Tractor. (J.A. 193a) There was no national strike against GM. (J.S. 81a)

On October 8, 1967, the UAW increased its regular monthly dues by $10 to $20 a month at a special con-

---

[1] The facts and proceedings are discussed in considerably more detail in the two opinions of the Michigan Supreme Court (J.S. 6a-12a, 75a-85a). Citations to the Jurisdictional Statement's Appendices (1a-159a) will be preceded by "J.S." Citations to the Joint Appendix (160a-210a) will be preceded by "J.A."

[2] Portions of the First Amendment to the Constitution and relevant federal and state statutes are reproduced in an appendix to this Brief.

vention. (J.A. 172a) This increase was mainly due to fears of a depleted strike fund because of the Ford and Caterpillar strikes (*See, e.g.*, J.A. 172a, 187a, 193a, 204a, J.S. 6a, 44a, 46a, 75a, 80a, 101a, 103a, 104a, 134a) and also because of the possibility of Chrysler and GM national strikes. (J.A. 193a, J.S. 44a, 46a, 134a) Because the Ford and Caterpillar strikes ended (J.A. 193a, J.S. 9a) and because there was no Chrysler or GM strike, this dues increase was only required for October and November, 1967. (J.S. 9a, 81a, 137a, J.A. 173a)

The approximately 16,000 appellants — as well as all other UAW members — paid the increased dues, which totaled $20 to $40 for each individual for the two-month period. (J.S. 114a, J.A. 173a) The total of appellants' increased dues of $320,000 to $640,000 were added to a strike fund with an October 31, 1967 balance of $41,685,651. (J.S. 112a, 48a)

In order to maintain membership in good standing in the UAW, appellants were required to pay their union dues, including increases if proper under the UAW Constitution. (J.A. 187a) It was stipulated that the increased dues were paid in accordance with the UAW Constitution. (J.A. 173a; *see also* J.A. 187a; J.S. 80a, 7a, 32a) These dues were also found lawful under the National Labor Relations Act and properly implemented under the Labor Management Reporting and Disclosure Act.[3]

---

[3] After certain UAW members in California challenged the dues increase as unlawful under federal law, a National Labor Relations Board Regional Director and General Counsel examined the UAW's action to determine whether the dues could be enforced by threat of discharge under applicable union security agreements in compliance with Section 8(a)(3)(A) and 8(b)(2) of the NLRA. 29 U.S.C. §§ 158(a)(3) and (b)(2). Those sections allow unions to request the discharge of members failing "to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining member-

(*continued on following page*)

The UAW notified GM in November 1967 that there would be no national GM strike. (J.S. 81a) In December 1967, a new national GM-UAW agreement was reached and ratified, effective January 1, 1968. (*See, e.g.*, J.S. 81a, J.A. 161a, 170a, 194a)

As is customary in the automobile industry, after reaching agreement on the national contract, those local unions which had not reached local agreements, had the right to negotiate over matters of local concern and were exempted from the national GM-UAW no strike clause. (J.A. 202a)

Appellants also ratified their local union agreements and continued to work at their respective plants. (J.A. 178a, 179a)

Toward the middle of January, it became apparent that differences existed at a number of locations. (J.S. 135a, note 17) In late January 1968, local strikes began at three General Motors foundries — located in Saginaw, Michigan, Tonawanda, New York and Defiance, Ohio. (J.S. 9a, 109a, 110a, 135a, note 17) The three foundry strikes were purely over local issues. (*See, e.g.*, J.S. 9a, 82a, 135a, note 17, J.A. 162a) During the approximately ten-day period the foundry strikes were under way, each striking worker at the foundries received 2 or 3 days of strike fund benefits of $4.00 to $6.00 a day (J.S. 11a), which totaled $247,245.31. (J.S. 109a, 110a, 114a, 139a).

(*continued from preceding page*)

ship." *Id.* The NLRB concluded that the dues requirements — which are the sole basis of appellants' disqualification from unemployment compensation in this case — constituted a "permissible change in the periodic dues" structure and were therefore enforceable under valid union security clauses. (J.S. 144a-146a, 91a, note 25) In addition, a federal district court held that the dues increase was implemented in accordance with the requirements of Section 101(a)(3) of the Landrum-Griffin Act, 29 U.S.C. § 411(a)(3). *Cole* v. *Local 509, UAW.* (J.S. 147a-158a)

The local issue foundry strikes ultimately caused layoffs of some of the lower seniority employees at other Michigan GM plants. (J.A. 168a) Appellants, who were among those laid off, filed unemployment insurance claims in February 1968. (J.S. 99a)

Appellants were held by all agencies and courts to be "eligible" within Section 28 of the Michigan Employment Securities Act ("MESA"), because they were available for work, physically able to work, and were seeking work. (*See, e.g.*, J.S. 178a, 188a)[4]

General Motors sought to deny compensation benefits to appellants under the labor dispute qualification of MESA. The applicable part of Section 29(8) of MESA provides:

> (8) An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress . . . in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) in active progress . . . in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection 29(8) if he is not directly involved in such dispute.
>
> (a) For the purposes of this subsection 29(8), *no individual shall be deemed to be directly involved in a labor dispute unless it is estab-*
> *lished* [illegible]

[4] Michigan, as well as other states, distinguishes between "eligibility" which the employee must establish and "disqualifications" which the employer must prove. (*See, e.g.*, J.A. 207a)

* * *

> (ii) *He is* participating in or *financing* or directly interested in *the labor dispute which causes his total or partial unemployment*. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph.

(emphasis added)

All state agencies and courts held that appellants were not "participating" or "directly interested in" the three foundry strikes. (*See, e.g.*, J.A. 165a, 178a, 179a, 189a, 196a, 205a)

Some state agencies, and some lower state courts, however, disqualified appellants because they had "financed" the January 1968 foundry strikes when they had paid the dues increase in the fall of 1967.[5]

In 1980, the Michigan Supreme Court issued its first opinion in the case (J.S. 75a-98a), holding that appellants' November and December dues payments were not "regular union dues" payments within the meaning of MESA § 29(8)(a)(ii). In reaching this conclusion, the Court distinguished between "periodic dues", enforceable through a union security agreement under § 8(a)(3)

[5] The checkered procedural history included a ruling favorable to appellant by the Michigan Employment Security Commission (J.A. 165a, 166a), unfavorable rulings by the MESC Referee (J.A. 186a) and Appeal Board, favorable rulings by Circuit Courts in Genesee and Wayne Counties (J.A. 192a, 197a), an unfavorable ruling by a Circuit Court in Ingham County (J.A. 200) and an unfavorable ruling by the Michigan Court of Appeals. (J.A. 210a)

of the NLRA, 29 U.S.C. § 158(a)(3), and "regular dues" under MESA, holding that under the Michigan statute "dues payments [must be] required uniformly of union members and collected on a continuing basis without fluctuations prompted by the exigencies of a particular labor dispute or labor disputes." (J.S. 93a-94a)[6] The Court then remanded the case to the Michigan Employment Security Board of Review to receive additional evidence on whether the dues payments constituted "financing" under MESA. The Court retained jurisdiction and reserved the federal issues for its later ruling if necessary. (J.S. 98a)

On remand, the Board of Review engaged in a detailed accounting of the UAW's collection of dues payments and expenditure of strike benefits before and during the period of appellants' unemployment (J.S. 109a-113a) and took evidence regarding the UAW's internal deliberations leading to the increased dues assessment in October of 1967 and the suspension of added dues payments two months later. (J.S. 101a-109a)

In June 1982 the Board of Review issued a four-opinion plurality "advisory" decision holding that appellants' dues payments constituted "financing" under the Michigan statute. (J.S. 99a-142a) Two Board members based their ruling of disqualification largely on the fact that appellants' union had maintained a strike fund and that appellants' dues had entered the strike fund. (J.S. 99a-126a) The deciding vote was by the Board Chairperson. The chairperson concluded that the UAW and GM's exchange of sixty-day notices — statutorily required by

[6] The Court held that under MESA, the union dues payments were also required to be "in amounts and for purposes established prior to the inception of the labor dispute that caused the claimant's unemployment." (J.S. 78a, 92a)

Section 8(d) of the NLRA — to reopen their contract was a ground for disqualifying appellants. (J.S. 132a)

On December 28, 1984, the Michigan Supreme Court affirmed the Board's plurality conclusion on most of the state issues. (J.S. 6a-74a) In its opinion, the Court held that the issue of whether "irregular" dues payments constituted "financing" required an analysis of three factors: the "purpose" of the dues assessment, which included an analysis of whether the increased dues were aimed at "supporting labor disputes different in kind or scope from the one that caused [the claimant's] unemployment" (J.S. 34a); the "amount" of the dues payment "in terms of the entire program as well as in terms of the individual's contribution," including "the effect of the 'emergency' dues upon the resources of the union allocated to supporting labor disputes" (J.S. 36a); and the "temporal proximity" of the dues payments, which depended upon "the practical realities of the time needed to collect, transfer and distribute the non-ordinary funds." (J.S. 37a) Based on its analysis of these factors, the Court held that appellants' dues payments constituted "financing" under MESA § 29(8)(a)(ii). (J.S. 42a-51a)

Michigan disqualified appellants without ruling that any of appellants' dues were in fact paid to the foundry strikers. The Board plurality deemed that a portion of the increased dues paid by *all* UAW members reached the strikers. (*See, e.g.*, J.S. 114a, 125a) That view was not shared by two other Board members. (J.S. 138a-141a) The Michigan Supreme Court split 3 to 3 as to whether it was shown that any of appellants' dues could possibly have reached the strikers. (J.S. 72a-74a)

After concluding that appellants' dues increase "financed" a labor dispute within the meaning of the Michigan statute, the Michigan Supreme Court addressed

the federal preemption issues. First, it considered whether its interpretation of MESA § 29(8)(a)(ii) would conflict with appellants' NLRA Section 7 rights to form, join or assist labor organizations of their choice. Based on its review of the facts of the case, the Court found that its interpretation of Michigan law did conflict with appellants' Section 7 rights. (J.S. 61a-62a)

Next, the Court analyzed congressional intent to determine whether Congress intended to tolerate the conflict between NLRA and MESA. Interpreting this Court's decision in *New York Telephone Co.* v. *New York State Department of Labor*, 440 U.S. 519 (1979), the Michigan Supreme Court held that the Michigan statute did not violate the Supremacy Clause of the federal constitution:

> since the financing of labor disputes is "conduct touch[ing] interests so deeply rooted in local feeling and responsibility that . . . we could not infer that Congress had deprived the states of the power to act," *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244; 79 S.Ct. 773; 3 L.Ed.2d 775 (1959), and since Congress has stated its intention to tolerate a "financing" disqualification to unemployment benefits.
>
> (J.S. 12a)

The Michigan Supreme Court then briefly discussed Appellants' other contentions. The Court held that MESA did not interfere with internal union decisions because "[i]t is clearly not the intent of MESA Section 29(8)(a)(ii) to do so." (J.S. 69a) The Court also held that the disqualification was not a violation of appellants' First Amendment rights freely to associate. (J.S. 69a-72a)

Appellants appealed from the state Court's decision and from its later denial of rehearing.

This Court noted jurisdiction on October 15, 1985.

SUMMARY OF ARGUMENT

This Court had decided two cases which, like the instant case, presented questions of NLRA preemption of state unemployment compensation laws. Analysis in this case therefore properly begins with these two decisions.

In *Nash* v. *Florida Industrial Commission*, 389 U.S. 235 (1967), this Court relied on that branch of the preemption doctrine which proscribes state rules which directly "conflict with the federal Act." The *Nash* Court applied this principle and held preempted Florida's application of its "labor dispute" statute to deny unemployment benefits to an individual because she had filed charges with the National Labor Relations Board against her employer. The Court reasoned that such a denial of benefits impermissibly interfered with claimant's rights under the National Labor Relations Act and was therefore preempted.

New York Telephone Company v. *New York State Dep't. of Labor*, 440 U.S. 519 (1979), also arose in the unemployment compensation context but involved a separate branch of the preemption doctrine. That case involved a state law which allowed payment of unemployment benefits to strikers after an eight-week exclusion. Although, as the Court noted, New York's law did not present a question of state "interference with employee rights protected by Section 7," the case raised a claim of preemption under the *Machinists* doctrine because New York's law "altered the economic balance between labor and management." A majority of the Justices in that case agreed that, once there is an established conflict between the state law and federal labor policy, the state statute is presumptively preempted "unless there is evidence of Congressional intent to tolerate the state practice."

The instant case involves both the branch of the preemption doctrine that was involved in *Nash* and that branch involved in *New York Telephone*. As in *Nash*, the state has denied appellants' unemployment benefits because they have engaged in conduct protected by Section 7 of the NLRA. The conduct which formed the basis of appellants' disqualification — payment of the increased dues and allocation of increased revenues to the union's strike relief fund out of which the GM local foundry strikers were paid strike benefits — is clearly conduct protected by Section 7 of the NLRA. Thus, as in *Nash*, appellants were forced to choose between exercising their rights under the NLRA or maintaining eligibility for state benefits; they could not do both.

In addition, the Michigan law here "alters the economic balance between labor and management." Michigan law, by penalizing the UAW and its membership for allocating increased dues money to the strike fund, impedes the union's ability to marshall its financial resources in support of collective bargaining and has thereby "altered the economic balance."

Because the MESA both penalizes the exercise of Section 7 rights and upsets the economic balance of power, the claim of federal preemption here combines the force of the *Nash* claim with the force of the *New York Telephone* claim.

Here, as in any preemption analysis, the purpose of Congress is determinative. Because, as the Michigan Supreme Court explicitly found, the state law at issue here conflicts with federal law, appellee General Motors therefore has the obligation to affirmatively demonstrate congressional intent to tolerate that conflict. Contrary to the holding of the Court below, the historical evidence simply does not support the conclusion that Congress intended to tolerate the conflict presented here.

The starting point for analysis of whether Congress intended to tolerate a financing disqualification is, of course, the National Labor Relations Act. As the Michigan Supreme Court correctly observed, there is "no indication in the NLRA that Congress intended to tolerate the conflict complained of in this case." (J.S. 65a)

New York Telephone teaches that Congressional intent to tolerate state laws conflicting with federal labor policy may also be found in the Social Security Act (SSA) of 1935. There, this Court found affirmative evidence of Congressional intent to tolerate the state statute at issue. Thus, the Court found (i) at the time the SSA was enacted, the laws of some states provided unemployment benefits for strikers while other state laws denied such benefits; (ii) Congress was aware of these varying state laws; and (iii) in enacting the SSA, Congress considered and rejected proposals to overturn laws providing benefits to strikers.

In all relevant aspects, the legislative history of the Social Security Act is precisely to the contrary with respect to state laws disqualifying individuals who "finance" a strike. Thus, none of the state laws in existence prior to the August 1935 enactment of the Social Security Act contained "financing" provisions; and none of the reports or draft bills prepared by the Committee on Economic Security prior to the passage of the SSA contained "financing" provisions. Our research reveals no other evidence of Congressional awareness of "financing" provisions prior to passage of the Social Security Act. Thus, unlike *New York Telephone*, there is no affirmative evidence in the legislative history to suggest that Congress knew of, or intended to tolerate, the conflict presented by the application of "financing" provisions to union dues payments.

There is one development *subsequent to* the enactment of the SSA which the Michigan Supreme Court thought to be relevant here. Following passage of that Act in 1936, the President appointed a Social Security Board. In 1936, that Board developed a draft state bill which differed from the model bills and state laws in existence prior to 1936. The Board's draft bill contained a provision, adopted *in hæc verba* from a British Unemployment Act which disqualified individuals who were found to be "participating in, financing or directly interested in a labor dispute causing their layoff." Because the vast majority of states enacted unemployment laws immediately following President Roosevelt's reelection in 1936, many of these state laws incorporated this language.

Significantly, the Social Security Board's inclusion of the "financing" disqualification was short-lived. The first cases from state agencies applying that provision were not decided until 1938. Within two years thereafter, the Social Security Board recommended *against* inclusion of the financing disqualification because "it might operate to disqualify an individual not concerned with the dispute solely on the basis of his payment of dues to the union."

Until the Michigan ruling in this case, no state court has disqualified unemployed claimants solely for payment of dues or even for financing strikes. In the few other state court cases applying such disqualification, claimants were also in the same establishment as the strikers and participating or directly interested in the strike.

Finally, there is nothing in the District of Columbia Unemployment Compensation Act to suggest that Congress intended to permit the financing disqualification provisions. That law, enacted barely two weeks after the

SSA, did not include a financing provision at all. That Act was subsequently amended in 1943 to add the "directly interested or participating" language from the Social Security Board then-current draft bill. Thus, Congress has *never* incorporated a "financing" provision of any kind in the unemployment statute for the District of Columbia, much less indicated an intent that such a provision — if permissible at all — could be read to disqualify individuals solely on the basis of their exercise of the Section 7 right financially "to assist" their union. Taken as a whole, this historical evidence, unlike that in *New York Telephone*, contains not a single indication of Congressional intent to tolerate the conflict which admittedly exists between Michigan's interpretation of MESA and the rights guaranteed employees under the NLRA. Absent such evidence, the conflicting state law must yield to federal labor policy.

ARGUMENT

CONGRESS DID NOT INTEND TO TOLERATE THE CONFLICT THAT EXISTS BETWEEN THE NATIONAL LABOR RELATIONS ACT AND A STATE LAW WHICH DISQUALIFIES INDIVIDUALS FROM ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION SOLELY BECAUSE THOSE INDIVIDUALS PAID UNION DUES.

A. This case presents "a variant of a familiar theme," *Operating Engineers* v. *Jones*, 460 U.S. 669, 673 (1983): a claim that state action is preempted by the National Labor Relations Act. That Act has spawned a large number of such claims over the past five decades, and the general contours of the labor law preemption doctrine are by now well-established. Indeed, this Court has decided two cases which, like the instant case, presented preemption issues in the specific context of state

unemployment compensation laws. Analysis of this case properly begins with those two decisions.

Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967), was the first such case. There Florida held that petitioner's filing of unfair labor practice charges with the National Labor Relations Board against her employer was a "labor dispute" which disqualified her from unemployment insurance. The Court unanimously concluded that the Florida law was preempted by the NLRA, relying on the branch of the preemption doctrine which proscribes state rules which "conflict[] with the federal Act," *Auto Workers* v. *O'Brien*, 339 U.S. 454, 458 (1958) — a branch of preemption law most recently reaffirmed in *Brown* v. *Hotel and Restaurant Employees*, — U.S. —, 104 S.Ct. 3179, 3186 (1984). In *Brown* the Court stated: "If employee conduct is protected under Section 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is preempted by direct application of the Supremacy Clause."[7] The *Nash* Court applied this principle as follows to the benefit denial before it:

---

[7] *See also, e.g., Hill* v. *Florida*, 325 U.S. 538 (1945); *Auto Workers* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, 254 (1949); *Bus Employees* v. *Missouri*, 374 U.S. 74 (1963).

In recent years, this Court has on several occasions summarized the labor law preemption doctrine in terms that emphasize two broad principles, one associated with *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and the other associated with *Machinists* v. *Wisconsin Empl. Rel. Comm.*, 427 U.S. 132 (1976); variations of this bifurcated formulation of the preemption doctrine can be found, *e.g.*, in *Belknap* v. *Hale*, 463 U.S. 491, 498 (1983) and in *Metropolitan Life Ins. Co.* v. *Massachusetts*, — U.S. —, 105 S.Ct. 2380 (1985). In these terms, the preemption rule developed in *O'Brien* and applied in *Nash* is more akin to *Garmon* than to *Machinists*, since what is at issue here is state action addressing conduct protected by the NLRA, rather than state action addressing unregulated conduct. But whereas *Garmon* is generally designed to protect the primary jurisdic-

(*continued on following page*)

> It appears obvious to us that the financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. A national system for implementation of this country's labor policies is not so dependent on state law. Florida should not be permitted to defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the government's constitutional plan.
>
> (389 U.S. at 239)

New York Telephone Company v. *New York State Dep't. of Labor*, 440 U.S. 519 (1979), also arose in the unemployment compensation context but involved a separate branch of the preemption doctrine. That case involved a state law which allowed payment of unemployment benefits to strikers after an eight-week exclusion. The Court recognized that such a law did *not* present a question of state "interference with employee rights protected by Section 7," 440 U.S. at 529, and thus was unlike the Florida law in *Nash* which "trenched on the employee's federally protected rights contrary to the Supremacy Clause," *Id.* at 529 n. 15. But the Court in *New York Telephone* entertained the employer's claim that the state law nonetheless was preempted under *Machinists*

(*continued from preceding page*)

tion of the National Labor Relations Board, the rule of *O'Brien* and its progeny is designed to protect the substantive supremacy of federal law. Consequently, as this Court has cautioned, "care must be taken to distinguish preemption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the NLRB . . . although the two are often not easily separable." *Machinists, supra*, 427 U.S. at 138. *See also Brown, supra*, 104 S.Ct. at 3186 (important not to "confuse[] preemption which is based on actual federal protection of the conduct at issue from that which is based on the primary jurisdiction of the NLRB.").

v. *Wisconsin Empl. Rel. Comm.*, 427 U.S. 132 (1976) because it impermissibly "altered the economic balance between labor and management." 440 U.S. at 532. A majority of the Court concluded that under *Machinists* "there is preemption unless there is evidence of congressional intent to tolerate the state practice,'" *Id.* at 549 (Blackmun, J., concurring), but the Court sustained the New York law after finding that, in fact, "Congress intended that the States be free to authorize, or to prohibit" payment of unemployment benefits to strikers. *Id.* at 544 (plurality opinion).[8]

B. The instant case involves both the branch of the preemption doctrine that was involved in *Nash* and also the branch that was involved in *New York Telephone*.[9]

(1) As in *Nash*, the state here has denied unemployment compensation benefits to appellants because they

---

[8] The holding in *New York Telephone* that the burden was on those defending the state law to provide affirmative evidence of a congressional intent to tolerate that law was not embraced by the three-Justice plurality opinion in that case, *see* 440 U.S. at 540, but was integral to the concurring opinions of Justice Brennan, *see Id.* at 546, and of Justice Blackmun, writing for himself and Justice Marshall, *see Id.* at 549, and was likewise essential to the dissenting opinion of Justice Powell, in which the Chief Justice and Justice Stewart joined, *Id.* at 560. Thus, six justices in *New York Telephone* endorsed this allocation of the burden of proof.

[9] General Motors has also sought to rely on *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977). The claimant in that case argued that the Social Security Act or the Federal Unemployment Tax Act preempted all state laws which disqualify individuals whose unemployment is not "voluntary." This Court rejected such a facial attack on state law but carefully noted that it did not "consider or decide" any issue of NLRA preemption of state unemployment law. 431 U.S. at 475 n. 3. Issues of labor law preemption were neither raised nor addressed in *Hodory* for good reason: that case — unlike the present one — presented no issues of state interference with conduct protected by the NLRA or with any other aspect of federal labor policy. The Ohio statute denied benefits to those unemployed due to labor disputes with their *employer*, without regard to claimants' union membership or payment of dues.

engaged in conduct protected by Section 7 of the NLRA. There can be no doubt that by increasing their monthly dues in order to strengthen their bargaining position during the "collective bargaining emergency" and in thereafter deciding to expend strike fund money to aid the strikers at the three local GM strikes, the members of the UAW, acting through the democratic processes of the union, were exercising their rights under Section 7: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Nor can there be any doubt that in choosing to remain members of their union and in paying the increased dues, appellants were likewise exercising Section 7 rights: the right to "assist labor organizations" and to become, and remain, members of the bargaining "representative[] of their own choosing."[10] Finally, it is undisputed that the appellants have been denied unemployment compensation by Michigan solely because they (and their fellow union members) exercised their rights in the manner set forth above. Plainly, then, as the Michigan Supreme Court acknowledged, "a conflict

---

[10] This is true regardless of whether the dues in question were "regular" or "irregular," "periodic" or "intermittent," "emergency" or "routine." The Section 7 right to assist a labor organization is *not* confined to any particular form of dues payment. Thus, the preemption issue is not affected in the slightest by Michigan's determination that the dues in question were not "regular union dues."

Michigan does not disqualify payers of "regular" union dues even when a portion of such dues is allocated to a common strike fund. (J.S. 93a, 94a; J.A. 180a) That state ruling, however, is not before this Court. Instead, the narrow question presented here is whether Michigan may limit or carve up appellants' Section 7 rights to assist unions or retain membership in their labor organization when Congress and the Social Security Administration have indicated no intent to tolerate disqualifications based on payment of union dues.

does in fact exist between the NLRA and the MESA." (J.S. 62a)

The presence and significance of this conflict is easily demonstrated. To avoid disqualification, appellants would have had to refuse to pay the increased dues in October and November of 1967. Moreover, because payment of dues is a condition of membership under the union's constitution, a refusal to pay the dues would be tantamount to resignation from the union. Thus Michigan's ruling forces appellants to choose between: (1) exercising the federal right to retain membership in, and pay dues to, the collective bargaining representative of their choice; and (2) foregoing exercise of those federal rights in order to maintain eligibility for state benefits.[11] It was just such a forced choice between exercise of federal rights or eligibility for state benefits which formed the basis of this Court's unanimous holding in *Nash*.

(2) Similarly, the Michigan law at issue here "alters the economic balance between labor and management," *New York Telephone*, 440 U.S. at 532, in the same way as did the law in *New York Telephone*. One determinant of a union's bargaining power is the size of its strike fund,

---

[11] Another illustration is instructive here. Had appellants been members of some union *other* than the union whose members were engaged in the local strikes, appellants would not have been disqualified. For example, appellants would not have been disqualified had they been members of the International Union of Electrical Workers (IUE), which also represents some employees at GM facilities. Michigan has thus interfered with the crucial Section 7 right of employees to bargain through representatives of their own choosing by creating a significant disincentive for individuals to remain members of a particular union. This Court's recent decision in *Brown* v. *Hotel and Restaurant Employees* is not to the contrary. There the Court held that Congress had recently disclaimed an intent that Section 7 requires full freedom to elect particular union *officers* free from state law limitations. There is no similar indication of Congressional intent to tolerate state laws burdening the right to select particular *labor organizations*.

for a sizeable strike fund signifies a union's readiness to suffer a strike if need be to press its bargaining demands. Furthermore, during a strike, the size of a union's strike fund will in good measure determine the union members' ability to withstand the loss of wages, and thus the strength of their strike. Yet under the state law at issue here, a union which raises dues to increase its strike fund jeopardizes the eligibility of its members to receive unemployment compensation benefits if, as occurred here, those members subsequently are involuntarily laid off as the result of a strike by *other* members of the union. Thus the state law necessarily will deter unions from implementing dues increase intended to increase the size of a union's strike fund and to that extent will alter the economic balance of power.[12]

(3) For the purposes of labor law preemption analysis "as in any preemption analysis, '[t]he purpose of Congress is the ultimate touchstone.'" *Metropolitan Life Ins. Co.* v. *Massachusetts*, — U.S. —, 105 S.Ct. 2380, 2393 (1985). Because the MESA both penalizes the exercise of Section 7 rights and upsets the economic balance of

---

[12] Significantly, when Congress enacted the Labor Management Relations Act of 1947, there was substantial congressional recognition of the importance of strike funds to the collective bargaining system. Proposals to regulate the ability of unions to enforce union security agreements were resisted in Congress on the ground, *inter alia*, that such proposals could "weaken" a union "in relation to the problem it has to meet." 93 Cong. Rec. 6673 (Sen. Pepper) (1947). In making this argument Senator Pepper referred specifically to strike funds, stating *"If a union has the right to strike, it will need relief funds for its workers who are out on strike."* *Id.* Senator Pepper expressed a fear that under the proposal the Board would be able to preclude a union from "build[ing] up surplus for the workers," whereas "no one is going to tell the corporation which is the employer that it cannot build up a surplus for hard times." *Id.* Senator Taft assured Senator Pepper that the regulation of union security agreements that Taft was championing — and that eventually was enacted — contained *"no such restriction"* on the right of unions to generate strike funds. *Id.*

power, the claim of federal preemption here combines the force of the *Nash* claim with the force of the *New York Telephone* claim. Those claims have great force because the general understanding is that Congress, in passing and amending the NLRA, *did* intend to displace state laws which conflict with the Act or alter the balance of economic power between labor and management. Such a conflict with federal law therefore leads to the presumption that the state law is preempted. But that presumption is not irrebuttable. *New York Telephone* shows that where Congress in fact intends to tolerate the admitted conflict between state law and the NLRA, that particularized intention is determinative. And as *New York Telephone* also teaches, the burden is on GM to demonstrate affirmative evidence of such congressional intent and thus to rebut the "presumption of federal preemption," *Brown, supra,* 104 S.Ct. at 3187. And because Michigan is not only affecting the balance of power as in *New York Telephone* but is also denying benefits based on the exercise of Section 7 rights, we submit that it would take the strongest evidence of congressional intent to sustain Michigan's right to do so.[13]

C. (1) The starting point for the analysis of whether Congress intended to tolerate a financing disqualification such as that contained in MESA is, of course, the Wagner Act, the Act which establishes the rights with which such a provision conflicts, and the balance of

---

[13] *Brown* v. *Hotel and Restaurant Employees* is very instructive in this regard. As here, the Court in *Brown* was required to search for Congressional intent to tolerate an "actual conflict" between state law and the rights guaranteed by Section 7 of the NLRA. The evidence in *Brown* included lengthy Congressional hearings bearing on the precise issue presented by the conflict as well as specific and express Congressional approval, pursuant to Article 1, Section 10 of the U.S. Constitution, of a state regulation virtually identical to that before the Court in *Brown*. 104 S.Ct. at 3187-3190. *See also, De Veau* v. *Braisted,* 363 U.S. 144 (1960).

power which such a provision upsets. But that Act is the *source* of the "presumption of preemption"; the lesson of that Act is that, except as provided in *other* federal laws, Congress intended to displace state rules which conflict with Section 7 rights or which alter the economic balance of power. Plainly, then, the Michigan Supreme Court was correct in concluding that there is "no indication in the NLRA that the Congress intended to tolerate the conflict complained of in this case." (J.S. 65a)

(2) In *New York Telephone*, the Court found evidence of a congressional intention to tolerate the state law at issue there in the legislative history of the Social Security Act of 1935 ("the SSA"), the law which essentially established the unemployment compensation system and which was enacted within a few weeks after the Wagner Act. As we proceed to show, however, there is nothing in the SSA to suggest a congressional intent to tolerate a state law of the type at issue here, *viz.*, a law which denies unemployment compensation benefits to individuals who exercise their Section 7 rights to maintain union membership and to pay union dues.

(a) At the threshold it is important to note the SSA is generally a strange place to look for evidence of a congressional intent to tolerate state rules conflicting with NLRA policies, because the SSA was fashioned with a specific intent to preclude such conflicting state rules. One of the very few federal requirements imposed on state unemployment compensation laws by the SSA is that such state laws may *not* require, as a condition of continuing eligibility, that claimants be willing to accept substitute employment "if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." 26 U.S.C.

§ 3304(a)(5).[14] Senator Wagner explained that this provision was intended to prevent states from denying benefits to any worker "because he refuses to accept . . . as a condition of employment any interference with his right to self-organization." Senate Committee on Finance, Hearings on Economic Security Act, S. 1130, 74th Cong. 1st Sess., 5 (1935). Thus, it is unlikely, at best, that at the very same time Congress sought to prevent interference with the right of self-organization, Congress decided to tolerate interference with the right to assist labor organizations or to allow states to punish otherwise-eligible claimants because they chose to remain union members.

(b) In *New York Telephone*, the Court determined that there is a major exception to the federal policy precluding state unemployment compensation rules that interfere with Section 7 activity: in enacting the SSA, Congress did intend to permit the states to withhold benefits from individuals who exercise their right to strike or to pay benefits to strikers under certain circumstances. The Court based that determination on very specific legislative history showing that (i) at the time the SSA was enacted, the laws of some states provided unemployment benefits for strikers while other state laws denied such benefits; (ii) Congress was aware of these varying state laws; and (iii) in enacting the SSA Congress considered and rejected proposals to overturn laws providing benefits to strikers. 440 U.S. at 540-544.

---

[14] This provision was originally included as § 903 of the Social Security Act of 1935, but is now codified in the Internal Revenue Code. *See*, 49 Stat. 640. All states require, as a condition of eligibility, that claimants be actively seeking, or be prepared to accept, substitute work. The federal requirement, then, prohibits states from disqualifying claimants who refuse to accept substitute work when the position offered would require crossing a picket line or foregoing the federal right to self-organization.

In all relevant respects the legislative history of the Social Security Act is precisely to the contrary with respect to state laws disqualifying individuals who "finance" a strike.

Prior to Congressional consideration of the Social Security Act of 1935, only Wisconsin had established a state unemployment compensation law. During 1935, when passage of a federal act appeared imminent, six more states passed laws, most of which were to become effective only on passage of the federal Social Security Act. *See, e.g.*, Witte, *Development of Unemployment Compensation*, 55 Yale L.J. 21, 33 (1945).

None of the state laws which had been enacted or even were being considered as of the passage of the Social Security Act in August of 1935 contained a "financing" disqualification. Instead, these state laws fell into two categories: they either simply disqualified individuals whose unemployment was caused by a labor dispute in active progress in the establishment at which the individual was last employed, or they allowed benefit payments to such individuals after an increased waiting period. Neither of these types of state laws which pre-date the Social Security Act contained a "financing" provision of any sort.[15]

Prior to passage of the SSA, the President had created a Committee on Economic Security which prepared back-

---

[15] *See*, 1932 Wis. Laws Ch. 30, p. 63 (as amended by 1935 Wis. Laws Ch. 192, p. 292); 1935 Wash. Laws Ch. 145, p. 451; 1935 Utah Laws Ch. 38, p. 44; 1935 N.Y. Laws Ch. 486, pp. 1032-1033; 1935 N.H. Laws Ch. 179A, p. 165; 1935 Cal. Stat. Ch. 352, p. 1238; 1935 Mass. Acts Ch. 479, p. 644. *Cf. Unemployment Comp. Commis. of Alaska v. Aragon*, 329 U.S. 143 (1946), which upheld a territory's disqualification of strikers under a law which provided an eight-week exclusion. *Aragon*, which invoked a 1939-1940 labor dispute, supports the result of *New York Telephone* but is not instructive on the issue presented here, inasmuch as Alaska's law did not contain a "financing" disqualification.

ground materials, analyses and draft legislative materials to assist in the development of the Social Security Act. That Committee prepared several written reports and draft bills for state unemployment laws which were submitted to Congress during the hearings on the proposed federal Social Security Act. *None of those documents contained a "financing" disqualification provision.* Instead, the reports and draft bills submitted by the Committee on Economic Security contained a labor dispute disqualification stating simply:

> An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a labor dispute in active progress in the establishment in which he is or was last employed.
>
> (Preliminary Draft of a Suggested State Unemployment Compensation Act, reprinted in Hearings on S. 1130 before Senate Committee on Finance, 74th Cong. 1st Sess., at p. 601.)[16]

Finally, so far as our research discloses, at no point during the hearings and debates over the SSA did any witness or any legislator contemplate the possibility of a financial disqualification provision being enacted, let alone suggest that such a provision would be permissible and could be used to disqualify individuals for paying union dues. Thus, there is no affirmative evidence in the legislative history of the SSA to suggest that Congress intended to tolerate the conflict between the MESA and the NLRA that is at issue here.

---

[16] *See, also,* Preliminary Draft No. 2, *Id.* at 621; *see also,* Report on Advisory Council to Committee on Economic Security, reprinted in Hearings on S. 1130 before Senate Committee on Finance, 74th Cong. 1st Sess., at p. 228.

(c) There is one development *subsequent* to the enactment of the SSA which the Michigan Supreme Court thought to be relevant here. After the Act was passed, the President appointed a Social Security Board. In 1936, that Board developed a draft state bill which differed from the model bills that the Committee on Economic Security had prepared and had submitted to Congress prior to the enactment of the SSA.[17] Whereas the Committee's model bill had provided for the disqualification of an employee not working as a result of a strike at the employee's establishment, the Board's 1936 draft bill borrowed language, *in haec verba,* from the British unemployment compensation law. Under that language an employee not working as a result of a strike at the employee's establishment would be disqualified if the employee (or members of his "grade or class") were "participating in financing or directly interested in" the strike. Social Security Board, Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types Section 5(c) (1936) (quoted at J.S. 68a).[18]

Significantly, the financial disqualification provision in the Board's draft bill was short-lived. The first American

---

[17] This 1936 draft bill which first included the "financing" language was based in large part on the 1924 British Unemployment Act. Williams, *The Labor Dispute Disqualification — A Primer and Some Problems,* 8 Vand. L. Rev. 338, 339 (1955). Note, *Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed Because of Labor Disputes,* 49 Col. L. Rev. 550, 560-561 (1949).

[18] During the first ten months of 1936, only a few states enacted unemployment compensation laws, as most states were awaiting the outcome of the 1936 presidential election. Within six weeks thereafter, "nearly all the remaining states passed laws" in order to secure the benefits of a tax credit that was available under the SSA. Witte, *supra,* Yale L.J. at 33. To assure speedy federal approval of their programs, virtually all of these states followed the 1936 model bill. For this reason, the financial disqualification provision in that bill found its way into the laws of a large number of states.

cases applying that provision were not decided until 1938.[19] Within two years thereafter, the Social Security Board, in its 1940 Manual of State Employment Security Legislation, recommended *against* inclusion of the financing disqualification provision. The Board explained:

> The provision found in some laws extending the disqualification to individuals who are financing a labor dispute is *not recommended since it might operate to disqualify an individual not concerned with a dispute solely on the basis of his payment of dues to the union* that is conducting the strike.
>
> (Social Security Board, Manual of State Employment Security Legislation (1940), pp. 504-505.)

Because the financial disqualification provision in the Board 1936 draft bill did not surface until *after* the passage of SSA, that provision is, at most, of very limited probative value in assessing Congress' intent in enacting the SSA.[20] *Cf., e.g., Teamsters* v. *United States*, 431 U.S. 324, 354 n. 39 (1977). Moreover, even if the post-Act views of the Social Security Board could some-

---

[19] The handful of early state administrative agency decisions which our research has revealed are inconsistent on the issue of "financing" generally, and on the question of union dues in particular. *See* cases cited in Williams, *The Labor Dispute Disqualification — A Primer and Some Problems*, 8 Vand. L. Rev. 338, 349-350 (1955) and n. 50. Note, *Eligibility for Unemployment Benefits of Persons Involuntarily Unemployed Because of Labor Disputes*, 49 Col. L. Rev. 550, 560-561 and n. 71 (1949); Shadur, *Unemployment Benefits and the 'Labor Dispute' Disqualification*, 17 U. Chi. L. Rev. 294, 328 n. 151 (1950).

[20] In addition, the inclusion of a "financing" provision in this draft bill is hardly probative of the limitations which federal *labor law* places on state discretion in this area or Congressional intent to tolerate conflicts with the NLRA. The Social Security Board had no particular knowledge of or sensitivity to issues of federal labor law. The adoption of the word "financing," along with the entire provision from the British Act, occurred, so far as our research reveals, without any consideration of the potential impact of such a provision on rights guaranteed by the NLRA.

how be imputed to Congress as Congress' views, the totality of that Board's actions make clear that the Board never intended, in borrowing language from English law, to provide for disqualification of an employee out of work due to a strike "solely on the basis of [the] payment of dues to the union that is conducting the strike." Thus, the model bill cannot be read as evidence that Congress intended to tolerate the conflict between the MESA and the NLRA.

(d) Finally, it is worth noting that there is nothing in the District of Columbia Unemployment Compensation Act to suggest that Congress intended to permit financing disqualification provisions. That law was enacted by Congress, acting as the legislature for the District of Columbia, within two weeks after the SSA. In enacting that law, Congress took great care to establish a statute which would be a "beacon light which the states could safely follow." 79 Cong. Rec. 8274 (May 27, 1935) (remarks of Representative Ellenbogen). It is thus significant that the law Congress enacted, like all of the pre-1936 state laws, contained no "financing" disqualification at all. Instead, the District of Columbia Act simply provided: "An employee shall not be eligible for benefits for any week in which his total or partial unemployment is directly due to a strike or jurisdictional labor dispute still in active progress in the establishment in which he is or was last employed." 1935 D.C. Stat. 558, 49 Stat. 950.

Moreover, Congress amended the District's Act in 1943 to add a provision similar to the Board's draft bill. By this time the Social Security Board had developed (and withdrawn) its financing disqualification provision. Significantly, Congress did *not* include such a provision in the amendment to the District of Columbia law, but instead exempted from disqualification individuals "not

participating in or directly interested in the labor dispute which caused [the] unemployment" and who do not "belong to a grade or class of workers . . . any of whom are participating in or directly interested in the dispute." Pub. L. No. 65, 78th Cong., 1st Sess., 1943 D.C. Stat. 64.[21] Thus, Congress has *never* incorporated a "financing" provision of any kind in the unemployment statute for the District of Columbia, much less indicated an intent that such a provision — if permissible at all — could be read to disqualify individuals solely on the basis of their exercise of the Section 7 right financially "to assist" their union.

Taken as a whole, this historical evidence, unlike that in *New York Telephone*, contains not a single indication of Congressional intent to tolerate the conflict which the Michigan Supreme Court admitted exists between its interpretation of MESA and the NLRA. Absent such evidence, the conflicting state law must here, as in *Nash*, yield to federal labor policy.

D. We now turn to examine in greater detail the reasoning of the Michigan Supreme Court. That Court, in our view, correctly established the framework for its examination of Congressional intent. Thus the Court below properly found that its interpretation of the state's "financing" disqualification presented a conflict with the rights guaranteed employees under Section 7 of the NLRA. (J.S. 62a) That Court also properly found that, having identified such a conflict, the party seeking to save the conflicting state law from preemption must bear the burden of affirmatively establishing that "Congress

[21] Unfortunately, our search of the legislative history reveals no discussion of this aspect of the 1943 amendments. Instead, that history focuses almost exclusively on various proposed changes in tax rates and accounting methods. H. Rep. 232, 78th Cong. 1st Sess. *See also*, 89 Cong. Rec. 2294-2307 (March 22, 1943).

intended to tolerate the conflict caused by the challenged state law." (J.S. 63a) As we proceed to show, the error committed by the Court below, then, was in the conclusion it drew from the historical evidence of Congressional intent.

The Michigan Supreme Court relied on four observations to support its conclusion that Congress intended to tolerate the conflicting state law at issue in this case; none of the Court's observations support its conclusion.

First, the Court noted that Congress, in the Social Security Act, intended to provide the states with "very wide discretion and considerable autonomy in establishing and regulating their unemployment compensation systems." (J.S. 66a) But the fact that Congress intended the states to have "wide discretion" does not mean, as the Court below thought, that Congress intended the states to have *unlimited* discretion. Indeed, the very fact that Congress prohibited the states from denying benefits to a claimant who exercises the Section 7 right to join a *bona fide* labor organization, see page 23, *supra*, demonstrates that there are some limits on the states' discretion to create eligibility conditions. Moreover, *Nash* squarely holds that there are further limits on the states' ability to use their "labor dispute" disqualifications to impede exercise of rights guaranteed by federal labor law. These limitations arise from the NLRA. The ultimate question is whether Congress intended the states to have the freedom to adopt the particular eligibility condition at issue in this case, notwithstanding the conflict between that condition and the NLRA. And that question is *not* answered by the fact that, as a general matter, Congress intended to leave the states with wide discretion.

Second, the Michigan Supreme Court, following *New York Telephone*, correctly noted that Congress intended

that states enjoy the freedom to pay unemployment benefits to strikers. As we have shown *supra* at page 18, the holding of *New York Telephone* was based exclusively on an analysis of the legislative history on the narrow question of *striker* eligibility. In contrast, the "financing" disqualification by definition applies only to those employees *not* on strike. And the legislative history on the issue of financing disqualifications, in contrast to that on striker eligibility, simply does not establish an affirmative "congressional intent to tolerate the state practice." *New York Telephone*, 440 U.S. at 549 (Blackmun, J., concurring).

Third, the Court below relied on the fact that the draft unemployment bill prepared by the Social Security Board in 1936 contained a provision disqualifying individuals "participating in or financing or directly interested in the labor dispute" causing their layoff. (J.S. 67a-68a) As discussed *supra* at pages 27-28, this language was taken directly from British unemployment law and was modified to eliminate the "financing" disqualification altogether when it became apparent that such a provision "*might* operate to disqualify an individual not concerned with a dispute solely on the basis of his payment of dues to the union that is conducting the strike." 1940 Manual of State Employment Security Legislation, *supra*. We believe that this statement is much more probative of the Social Security Board's intent than its short-lived inclusion of the "financing" language (without comment as to its applicability to union dues payments) from the British act.

Finally, the Michigan Supreme Court relied on Congressional silence in the face of several state laws which still, despite the recommendations of the Social Security Board, contain "financing" disqualifications as evidence of Congressional approval of such laws and their applicability to union dues payments. (J.S. 68a-69a) Similar arguments attempting to construe Congressional silence as implicit acquiescence have been previously rejected by this Court. *Zuber* v. *Allen*, 396 U.S. 168, 185 (1969) ["Legislative silence is a poor beacon to follow."] In addition, Congressional silence in the present case is best understood, not as an indication of acquiescence to disqualifications based solely on union dues payments construed as "financing," but rather as an indication of acquiescence to the consistent refusal of state courts to base disqualifications on financing alone.

Indeed, our research has revealed not a single court decision holding that claimants were disqualified solely on the basis of payment of union dues, or even solely on grounds of "financing" *at all*. Thus, in the handful of reported cases we have discovered which even mention "financing," claimants were either held not disqualified or were disqualified on the basis of their being in the same establishment as the strikers and because of "participation" or "interest," *not* "financing." While a few of these cases contain *dicta* discussing the issue of "financing," none rely on "financing" alone to disqualify claimants. *See, General Motors* v. *Bowling*, 85 Ill. 2d 539, 426 N.E. 2d 1210, 1212-1213 (Ill. 1981) (payment of dues held not financing); *Outboard Marine & Mfg. Co.* v. *Gordon*, 403 Ill. 523, 87 N.E. 2d 610, 618 (Ill. 1949) (payment of dues alone not "financing"); *Burrell* v. *Ford Motor Company*, 386 Mich. 486, 192 N.W. 2d 207, 211 (Mich. 1971) (payment of dues not financing); *Burgoon* v. *Board of Review*, 100 N.J. Super. 569, 242 A.2d 847 (N.J. Super. Ct. App. Div. 1968) (claimants in same plant held directly interested and financing); *Soricelli* v. *Board of Review*, 46 N.J. Super. 299, 134 A.2d 723 (N.J. Super. Ct. App. Div. 1957)

(claimants at same plant held directly interested, participating and financing).[22]

In addition, legal commentators have variously referred to "financing" disqualifications as "a dead letter," Shadur, *supra*, 17 U. Chi. L. Rev. at 328; "devitalized [and] of small practical significance," Note, *supra*, 49 Col. L. Rev. at 561; and having "little significance," Williams, *supra*, 8 Vand. L. Rev. at 349. Congressional silence, if probative at all, is therefore properly seen not as evidence of Congressional approval of "financing" disqualifications and their potential application to union dues payments, but rather as Congressional approval of the *refusal* of states to disqualify claimants solely on the basis of financing.

Taken as a whole, the foregoing historical evidence demonstrates no Congressional intent to tolerate the conflict presented here. As the Michigan Supreme Court properly found, in this situation the party seeking to save such a conflicting state law from federal preemption bears the burden of demonstrating affirmative Congressional intent to tolerate the conflict. Because, as we have shown, no such evidence has been presented here, Michigan may not apply its statute to conflict with appellants' federal rights.

---

[22] Nor is there any evidence that the continuing existence of "financing" disqualifications was ever brought to the attention of Congress. For example, the House Ways and Means Committee's Social Security Technical Staff reported in 1946 that a provision which did *not* mention "financing" but disqualified only those who were "participating in or directly interested in" the dispute could be "*taken as typical* of the 'labor dispute' provision in State laws." Issues in Social Security, Report to the House Committee on Ways and Means by the Committee's Social Security Technical Staff, 79th Cong. 1st Sess., p. 384, n. 31.

CONCLUSION

For the foregoing reasons, this Court should reverse the Michigan Supreme Court and hold that appellants may not be denied their unemployment compensation.

Respectfully submitted,

By: FRED ALTSHULER
Altshuler & Berzon
177 Post Street, Suite 600
San Francisco, CA 94108
(415) 421-7151

By: /s/ JORDAN ROSSEN
Counsel of Record
RICHARD W. McHUGH
DANIEL W. SHERRICK*
8000 E. Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

Counsel for Appellants

Dated: December 6, 1985

---

* Substantial work on this brief was done by Judy Chambers and Harry Newman, law graduates of Wayne State University and the University of Michigan Law Schools, and by Katherine Miller, a second-year law student at Northeastern University School of Law, Rosemary Chase, a second-year student at the Detroit College of law, and Joseph Slater, a third-year law student at the University of Michigan Law School, as supervised by Appellants' counsel. Appellants' counsel also acknowledges extraordinary work by legal secretaries Dolores Gray and Julie Rand.

INDEX TO ADDITIONAL APPENDIX

ADDITIONAL APPENDIX

• • •

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment, United States Constitution, provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 7 of the National Labor Relations Act, 29 USC § 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(3) of the National Labor Relations Act, 29 USC § 158(a)(3), provides:

It shall be unfair labor practice for an employer —

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in

this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 8(b)(2) of the National Labor Relations Act, 29 USC § 158(b)(2), provides:

It shall be an unfair labor practice for a labor organization or its agents —

* * *

(2) to cause or attempt an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an

employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining memberships.

Section 8(d) of the National Labor Relations Act, 29 USC § 158(d), provides in part:

That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

Section 101(a)(3), Labor Management Reporting and Disclosure Act, 29 USC § 411(a)(3), provides:

[The] rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except —

* * *

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular con-

vention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and by-laws of such labor organization: *Provided*, That such action on the part of the executive board of similar governing body shall be effective only until the next regular convention of such labor organization.

Portions Of 1967 Michigan Employment Security Act*:

Section 2:

"The legislature acting in the exercise of the police power of the state declares that the public policy of the state is as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment . . . requires action by the legislature to prevent its spread and to lighten its burden which so often follows with crushing force upon the unemployed worker and his family, to the detriment of the welfare of the people of this state . . . Employers should be encouraged to provide stable employment. The systematic accumulation of funds during periods of employment to provide benefits

* MCLA Secs. 421.1, et seq., MSA Secs. 17.501, et seq.

for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, thus maintaining purchasing power and limiting the serious social consequences of relief assistance, is for the public good, and the general welfare of the people of this state."

Section 28:

"An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:

(a) He . . . is seeking work: . . .
(b) He has made a claim for benefits . . .
(c) He is able and available to perform full-time work"

Section 29(8):

(8) An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress, or to shutdown or start-up operations caused by that labor dispute, in the establishment in which he is or was last employed, or to a labor dispute, other than a lockout, in active progress, or to shutdown or start-up operations caused by that labor dispute, in any other establishment within the United States which is functionally integrated with the establishment and is operated by the same employing unit. An individual shall not be disqualified under this subsection if he is not directly involved in the dispute.

(a) For the purposes of this subsection an individual shall not be deemed to be

directly involved in a labor dispute unless it is established that:

* * *

(ii) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established before the inception of the labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph.

Section 3304(a)(5) Of The Federal Unemployment Tax Act, 26 USC § 3304(a)(5), provides:

(a) Requirements. — The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that —

* * *

(5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;

(B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those

prevailing for similar work in the locality;

(C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

APPELLEE'S

BRIEF

No. 85-117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,
Appellants,

v.

GENERAL MOTORS CORPORATION,
Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Appellee.

On Appeal from the Supreme Court of Michigan

BRIEF OF APPELLEE GENERAL MOTORS CORPORATION

J. R. WHEATLEY
GENERAL MOTORS CORPORATION
New Center One Building
3031 West Grand Boulevard
Post Office Box 33122
Detroit, Michigan 48232
(313) 974-1792

JONATHAN N. WAYMAN
FILDEW, HINKS, GILBRIDE, MILLER & TODD
3600 Penobscot Building
Detroit, Michigan 48226
(313) 961-9700

PETER G. NASH
Counsel of Record
DIXIE L. ATWATER
OGLETREE, DEAKINS, NASH, SMOAK AND STEWART
1200 New Hampshire Ave., N.W.
Suite 230
Washington, D.C. 20036
(202) 887-0855

Counsel for Appellee
General Motors Corporation

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the National Labor Relations Act preempt a state unemployment compensation statute which disallows benefits for employees laid off as the result of a strike which they themselves financed by payments other than regular union dues?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-117

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,
Appellants,

v.

GENERAL MOTORS CORPORATION,
Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,
Appellee.

On Appeal from the Supreme Court of Michigan

BRIEF OF APPELLEE GENERAL MOTORS CORPORATION *

STATEMENT OF THE CASE

The case before the Court involves a Supremacy Clause challenge to the Michigan Employment Security Act ("MESA"), MCLA §§ 421.1 *et seq.*, on the ground that its labor dispute disqualification from unemployment

---

* The list of General Motors' subsidiaries and affiliates (see Rule 28.1) is set forth at page i of the Company's Motion to Dismiss.

compensation is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* The Appellants are employees of General Motors and members of the United Auto Workers ("UAW") who were laid off in early 1968 as the foreseeable and predictable result of UAW strikes at other, functionally integrated General Motors facilities. The Michigan Supreme Court held that Appellants had knowingly financed these other UAW strikes through special emergency strike fund dues payments, and the Appellants were thus denied unemployment compensation benefits under MESA because they financed the very strikes that caused their unemployment (J.S. 6a-74a).[1]

Although MESA and the NLRA have peacefully coexisted for almost 50 years, the Appellants now assert that the Michigan statute's "financing" disqualification unconstitutionally infringes on employees' rights under Section 7 of the NLRA (29 U.S.C. § 157) and interferes with the UAW's economic weapons. The facts underlying this case, and the nature and application of the Michigan statute, are summarized below.

The events which prompted the instant dispute occurred in the fall of 1967 during the UAW's nationwide and coordinated automobile industry contract negotiations. On October 8, 1967, in the midst of nationwide strikes against Ford and Caterpillar Tractor and in anticipation of a possible strike or strikes against GM, the UAW called a special national convention. The purpose of the convention[2] was to authorize temporary

[1] "J.S. ——" designates citations to the Jurisdictional Statement and its Appendices.

[2] According to the published "Proceedings" of the convention, the purposes included (J.S. 7a):

> 2. To consider revision of the dues program of the International Union, UAW, to provide adequate strike funds to meet the challenges of the 1967 and 1968 collective bargaining effort.
>
> 3. To consider revisions of the Constitution of the International Union as it relates to the payment of dues, strike fund,

emergency dues payments by UAW members to provide strike fund assistance to UAW members who might strike or be laid off because of strikes[3] during the auto industry bargaining. More specifically, the convention was asked to impose emergency dues in order to benefit not only the then-striking UAW workers at Ford and Caterpillar, but also the UAW workers at GM. For example, during the convention proceedings a UAW official stated (J.S. 45a):

> In the event we have a strike at General Motors—and my educated guess is that unless General Motors Corporation begins to bargain intelligently and unless the GM Corporation begins to improve the grievance procedure and representation system in the GM contract, we are going to have a strike in that corporation—I am sure that nobody would want Vice President Leonard Woodcock and the bargaining committee to go to the bargaining table at General Motors with our strike fund depleted.

> membership eligibility, strike insurance program and other matters related to emergencies facing the International Union, UAW.

The background paper presented to convention delegates stated (J.S. 44a-45a):

> To support the Ford and Caterpillar workers in their strike and to assure strike benefits to members who may be involved in other strikes in the course of the critical weeks and months ahead, a temporary emergency dues increase is needed, the total increase going into the International Strike Fund to be used exclusively to support workers and their families when they are forced to strike to achieve their just demands.

[3] Under the UAW's "layoff loan" program, a UAW member who is laid off as a result of a UAW strike at another plant may receive strike benefits if he or she applies for and is denied state unemployment compensation. In the event the employee ultimately receives state compensation, he or she repays the loan to the UAW strike fund, but if no state payments are ultimately received, the loan is forgiven. See General Motors Motion to Dismiss the Appeal to this Court, p. 21; Michigan Supreme Court Appendix at 39a-40a, 61a-64a, 74a-75a, 224a-261a, 106b.

In addition, the then-UAW Vice President and Director of the General Motors Department (Leonard Woodcock) later explained to GM employees the need for the new strike payments as follows (J.S. 45a-46a):

> It is also needed to replenish the fund so that our bargaining teams at General Motors and Chrysler—and other plants—can bargain with the assurance that strike assistance benefits will be available should those workers have to hit the bricks later on.
>
> * * * *
>
> These emergency extra dues are being raised to protect GM workers as well as support the Ford strikers. When our time comes at GM, we cannot go back to the bargaining table without an adequate strike fund behind us and promise of continued assistance from other UAW members.[4]

During its one-day session, the convention approved a proposed temporary increase in its members' strike fund payments from $1.25 per month to $11.25 or $21.25 per month (increases of 800% or 1600%, respectively.[5]

[4] The conclusion that the emergency payments were intended to finance GM strikes and other strikes aside from those at Ford and Caterpillar was further supported by the fact that the latter two strikes ended, respectively, on October 22 and October 25, 1967, before the first emergency dues were sent to the UAW's strike fund, and by the fact that the emergency funds were not needed to finance the Ford strike (J.S. 9a, 45a). However, the UAW continued to collect these special emergency dues during the remainder of October and all of November (J.S. 9a) in anticipation of upcoming GM strikes (J.S. 124a).

In addition, the Michigan court found that local GM strikes appeared probable in view of the fact that local GM strikes had occurred in *every* contract year starting in 1958 and that the immediately preceding GM negotiations had resulted in a "10-day strike at GM on national issues, followed by many local strikes, some lasting as long as six weeks" (J.S. 46a; quoting the Woodcock letter to GM employees cited in the text). These 1964 GM strikes caused strike fund expenditures exceeding $37 million (*id.*).

[5] The amount of the increase depended upon the average straight time earnings in each member's plant. Members in plants with

That increase was to last only on a month-to-month basis during the emergency period and thereafter until the strike fund equalled $25 million (J.S. 7a-8a). The emergency strike fund dues, in fact, lasted only two months (October and November, 1967) (J.S. 9a), during which time the 19,000 members of the Appellant class contributed emergency strike funds of between $380,000 and $760,000 (J.S. 49a-50a, 114a).[6]

In January and February, 1968, UAW members at GM foundries in three cities (J.S. 109a-110a) went on strike and were paid strike benefits from the UAW strike fund to which the Appellants had contributed their emergency dues (J.S. 9a, 50a). As a result of those strikes it was no surprise to anyone, including the GM workers who had helped to finance the strikes (J.S. 47a, 124a), that other, functionally integrated GM plants which relied upon the foundries were forced to curtail operations and to lay off employees, including the Appellants in this case (J.S. 9a).

The Appellants then filed unemployment compensation claims with respect to their layoffs resulting from the foundry strikes they had helped to finance, and those claims were denied under a MESA provision which states (J.S. 9a-10a):

> An individual shall be disqualified for benefits for any week with respect to which his total or partial

average hourly earnings of $3.00 or more were assessed $21.25 per month (a 1600% increase), whereas those in plants with less than $3.00 average hourly earnings were assessed $11.25 per month (an 800% increase). See J.S. 8a.

[6] Although GM's contract with the UAW had expired and, accordingly, there was no enforceable union security agreement which would have required GM employees to pay these special emergency dues, all the Appellants in this case did pay the special dues (J.S. 107a). And, because there was no dues "check-off" system in effect by which GM would withhold dues from employee paychecks and send the funds to the UAW, each individual personally made these special emergency payments (J.S. 9a, 118a-119a).

unemployment is due to a labor dispute . . . in the establishment in which he is or was last employed, or to a labor dispute (other than a lockout) . . . in any other establishment within the United States which is functionally integrated with such establishment and is operated by the same employing unit. No individual shall be disqualified under this subsection . . . if he is not directly involved in such dispute.

(a) For the purposes of this subsection . . . no individual shall be deemed to be directly involved in a labor dispute unless it is established that:

* * * *

(ii) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues (in amounts and for purposes established prior to the inception of such labor dispute) shall not be construed as financing a labor dispute within the meaning of this subparagraph.

MCLA § 421.29(8)(a)(ii).[7]

[7] The unemployment compensation statutes in virtually all states disqualify employees whose unemployment is due to a labor dispute. Only New York presently provides benefits to strikers after an 8-week waiting period. See N.Y. Lab. Law § 592(1) (McKinney Supp. 1984).

Moreover, 30 other states have "financing" disqualifications similar to Michigan's. Such provisions typically provide that an individual will be disqualified from unemployment benefits if his or her unemployment is due to a labor dispute, but that the disqualification shall not apply if it is shown "that the individual is not participating in, financing or directly interested in the labor dispute . . . ." Ariz. Rev. Stat. Ann. § 23-777 (1983). See also Colo. Rev. Stat. § 8-73-109 (1973 and Supp. 1985); Conn. Gen. Stat. § 31-236(3) (Supp. 1985); Fla. Stat. § 433.101(4) (1984); Ga. Code Ann. § 34-8-158(4) (Supp. 1985); Idaho Code § 72-1366(j) (Supp. 1985); Ill. Ann. Stat., Ch. 48, § 434 (Smith-Hurd Supp. 1985); Ind. Code Ann. § 22-4-15-3 (Burns Supp. 1985); Iowa Code Ann. § 96.5(4) (West 1984); Kan. Stat. Ann. § 44-706(d) (Supp. 1984); Me. Rev. Stat. Ann., Title 26, § 1193(4) (West Supp. 1985); Md. Ann. Code, Art. 95A, § 6(e) (1985); Mass. Ann. Laws, Ch. 151A, § 25(b) (West 1982); Mo. Ann. Stat. § 288.040(5) (Vernon Supp. 1986); Mont. Code Ann. § 39-51-2305 (1985); Neb. Rev. Stat. § 48-628(d); Nev. Rev. Stat. § 612.395 (1983); N.H. Rev. Stat. Ann. § 282:4(f) (1984); N.J. Stat. Ann. § 43:21-5(d) (West Supp. 1985); Ohio Rev. Code Ann. § 4141.29(D)(1)(a) (Page Supp. 1984); Ore. Rev. Stat. § 657.200 (1983); R.I. Gen. Laws § 28-44-16 (Supp. 1985); S.C. Code Ann. § 41-35-120(4) (Law. Co-op. 1977); S.D. Cod. Laws Ann. § 61-6-19 (1978); Tex. Rev. Civ. Stat. Ann., Art. 5221b-3(d) (Vernon Supp. 1985); Vt. Stat. Ann., Title 21, § 1344(4) (Supp. 1985); Va. Code § 60.1-52(b) (Supp. 1985); Wash. Rev. Code Ann. § 50.20.090 (1962); W. Va. Code § 21A-6-3(4) (1985); Wyoming Stat. § 27-3-313(a)(i) (1983).

In ultimately sustaining the denial of benefits to the Appellants, the Michigan Supreme Court recognized that the fundamental purpose of the Michigan Employment Security Act was to provide unemployment compensation benefits only to employees who are out of work through no fault of their own (J.S. 12a-14a).[8] As a consequence, the Michigan legislature had determined that employees within the State should be disqualified from unemployment compensation if their unemployment is due to a labor dispute in which they are directly involved and for which they themselves must therefore bear some responsibility. The Michigan Supreme Court thus found that the test for "direct involvement" at issue here—"financing" strikes that cause one's own unemployment—had to be interpreted in a manner that would comport with MESA's fundamental theme of providing benefits to those who are out of work through no fault of their own (J.S. 14a). Accordingly, the court drew a very narrow and carefully circumscribed test for the MESA financing disqualification. In its two decisions below (J.S. 75a-98a and J.S.

[8] This purpose is in accordance with congressional intent in establishing the cooperative federal-state unemployment compensation system in 1935. See *California Dept. of Human Resources Development v. Java*, 402 U.S. 121, 130 (1971) (In passing Title IX of the 1935 Social Security Act, "[t]he objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee.").

6a-74a), that court established the following criteria that had to be met in order to disqualify Appellants under the financing provision: (1) that Appellants' unemployment must, in fact, have been caused by strikes at other GM plants (J.S. 77a); (2) that the labor disputes causing their unemployment were, in fact, financed by payments from Appellants (J.S. 33a-35a); (3) that the Appellants' payments which helped to finance those strikes were *not* regular union dues (J.S. 79a);[9] (4) that the labor disputes causing Appellants' unemployment were foreseeably within the scope of the labor disputes for which Appellants made payments (J.S. 33a-35a); (5) that the Appellants' unemployment was the foreseeable result of the labor disputes the Appellants financed (*id.*); (6) that the purpose of Appellants' payments (i.e., to finance strikes which would foreseeably result in Appellants' unemployment) was evident at the point in time they made the payments (*id.*); (7) that the amount of Appellants' financial assistance was significant in terms of the amount collected and the role it played in financing the labor disputes (J.S. 33a, 35a-37a); and (8) that Appellants' payments were made in close temporal proximity to the strikes that caused their unemployment (J.S. 33a, 37a).

Applying these tests to the facts at hand, the Michigan Supreme Court easily concluded that the Appellants should be denied unemployment compensation because they had contributed to their own unemployment by "financing" the strikes that caused their unemployment within the meaning of the Michigan statute. According to the court, the Appellants' emergency strike fund dues were not "regular union dues," but rather, were "extraordinary" (J.S. 78a), and the purpose, amount and

[9] Because the court determined that the Appellants' payments did not constitute "regular union dues," the court found it unnecessary to consider the disqualifying provision's parenthetical requirement that the amount and purpose of the regular dues be established prior to the inception of the labor dispute (J.S. 78a, 95a).

timing of the dues meaningfully and predictably contributed to the labor disputes which caused their unemployment.[10]

Moreover, the court held (J.S. 51a-69a) that MESA's financing disqualification was not preempted by the National Labor Relations Act. The court found that although the provision conflicted with the NLRA, the legislative history and events surrounding the passage of the Social Security Act in 1935 indicated Congress' intent that states be free to enact such legislation. This brief deals with that question of labor preemption—the only issue now before this Court.[11]

[10] Throughout their brief Appellants misstate the issue in this case to be whether Michigan may disqualify individuals "solely because those individuals paid union dues" (see, e.g., Appellants' Brief at i, 1, 15). Patently, however, that is not what Michigan has done. The Michigan Supreme Court held that Appellants were disqualified because they knowingly and deliberately financed the strikes that caused their unemployment through special emergency strike fund dues, and that channeling the funds through their union did not render the disqualification impermissible. Moreover, the inaccuracy of the Appellants' statement of the issue is demonstrated by MESA itself. The statute specifically exempts the payment of "regular union dues" from the financing disqualification, and this exemption has been held to apply even though a portion of those regular dues is allocated to the union's strike fund. *Burrell v. Ford Motor Co.*, 386 Mich. 486, 494-495 (1971), cited at J.S. 93a-94a.

[11] The Appellants have abandoned an earlier contention, made to the Michigan Supreme Court and briefly referenced in their Jurisdictional Statement (J.S. 14), that the MESA financing provision burdens their First Amendment right of free association by disqualifying them for remaining union members and paying the emergency strike fund dues. The Michigan court was clearly correct in rejecting that claim. The Michigan statute does not condition benefits on a claimant's willingness to forego union membership; it denies benefits to persons who, union member or non-member, contribute to their own unemployment by financing the strike that causes it. The fact that Appellants financed such strikes by channeling their payments through their union is certainly their privilege, but their decision to take that route does not insulate them from MESA's financing disqualification or convert an objective standard

SUMMARY OF ARGUMENT

The interface of the National Labor Relations Act and state labor dispute disqualifications from unemployment compensation creates a basic conundrum in terms of the labor preemption doctrine. On the one hand, it can be argued that the *denial* of unemployment benefits to those who strike or who finance the strikes causing their unemployment makes the exercise of those NLRA rights more costly and thus conflicts with that statute. On the other hand, however, as all members of this Court recognized in *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979), *granting* unemployment benefits to those involved in a strike conflicts with the NLRA because it alters the congressionally-established balance of bargaining power between labor and management by enhancing the union's strike weapon in a two-fold fashion: it cushions the economic effects of the strike on the union's members and it significantly increases the economic burden of the strike on the employer, who must pay a higher, experience-rated unemployment compensation tax. This principle applies with equal force in the instant case, because invalidation of the Michigan financing provision would shift the natural

---

(financing a strike) into one that turns on their asserted First Amendment right to be a union member. In short, the MESA financing provision does not penalize the exercise of any recognized First Amendment right because the triggering mechanism is not union membership or support for the union, but rather, the claimant's financial support of the strike that causes his or her unemployment.

Moreover, even if Appellants' freedom of association were burdened, Appellants themselves conceded, according to the court below, that this case involves regulation in the social and economic field, and thus that their First Amendment claim could not succeed if Michigan had a rational basis for imposing a financing disqualification (see J.S. 69a-71a). See *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961). Such a rational basis obviously exists, as this Court has recognized in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 489-493 (1977). There the Court recognized that Ohio's denial of benefits to employees who are out of work because of a strike bore a rational relationship to the State's interest in protecting the fiscal integrity of its unemployment compensation fund and the State's desire to remain neutral in labor disputes. Both rationales apply with equal force to the MESA financing provision.

In addition to their First Amendment claim, Appellants have also apparently abandoned their contention that the MESA financing provision interferes with the primary jurisdiction of the NLRB under this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In their Jurisdictional Statement (J.S. 21-25), but not in their brief on the merits, Appellants argued that the financing disqualification is preempted because it requires state agencies and courts to determine whether a union's dues are "regular union dues." According to Appellants, that issue is committed to the NLRB under the NLRA provision which makes it unlawful for a union to cause an employer to discriminate against employees on grounds other than their failure to "tender the periodic dues and the initiation fees uniformly required" for union membership. 29 U.S.C. § 158(b)(2).

Appellants had good reason for abandoning this argument, for it is clearly without merit. The Michigan Supreme Court specifically rejected Appellants' contention that "regular union dues" under

---

MESA are the equivalent of "periodic dues" under the NLRA (J.S. 93a). Further, the court's discussion makes clear that the issues under the MESA financing provision are different from those under the NLRA's "periodic dues" provision. Accordingly, the MESA provision is not preempted under the *Garmon* primary jurisdiction doctrine. See *Belknap, Inc. v. Hale*, —— U.S. ——, 77 L. Ed. 2d 798, 814 (1983) (The critical inquiry under *Garmon* primary jurisdiction preemption "is whether the controversy presented to the state court is identical with that which could be presented to the [NLRB]."); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978) (same). Finally, any and every strike results in unemployment, and Congress left to the states the responsibility to determine whether those unemployed as the result of a strike should receive unemployment compensation. In making that judgment every state has to decide if employees are "on strike," and some 30 states have to decide if out-of-work employees "financed" the strike. See n.7, *supra*. The fact that the NLRB may sometimes have to decide similar issues in order to enforce the NLRA is of little meaning for preemption purposes because Congress authorized the several states also to make those same kind of decisions in determining entitlement to unemployment compensation.

economic consequences of the UAW's strikes from UAW members and their strike fund to their employer, General Motors.

This Court's decision in *New York Telephone* goes a long way in answering this labor preemption riddle. Since the members of this Court there unanimously concluded that granting benefits to strikers conflicts with the NLRA, the Court necessarily presumed that the NLRA itself countenances some intrusion on Section 7 rights (there the right to strike) in order to maintain the balance of bargaining power prescribed by the NLRA. Even if that were not the case, however, the Social Security Act and its legislative history relied upon in that decision establish that Congress intended to tolerate any such intrusion. That history shows that a financing disqualification is consistent with the underlying purpose of the Social Security Act, was actually prescribed by the administrative agency charged with interpreting that statute, is not materially different from a provision denying benefits to strikers, and has been a congressionally unchallenged feature of most states' unemployment compensation systems for 50 years. Further, by including Social Security Act provisions to protect employees' Section 7 rights outside the context of a labor dispute involving their own employer, Congress indicated that it intended for states to be free to disqualify employees who are involved in such labor disputes.

Thus, it is clear that Congress intended to give Michigan the freedom to act as it has in disqualifying those who finance the strikes that cause their unemployment, even if their financing activity might otherwise be deemed protected by Section 7. Appellants' contrary assertion—i.e., that the financing provision must be preempted unless it can specifically be shown that Congress considered and approved such a particular disqualification provision—is without merit. Even if there were a presumption of

preemption due to conflict with the NLRA, that level of specificity in proof of congressional intent is not required.

Moreover, there are sound reasons why a contrary presumption of non-preemption should apply in the context of labor dispute disqualifications under state unemployment compensation statutes. In contrast to most labor preemption cases, Congress here has specifically spoken on the subject of state legislation regarding unemployment compensation, and it provided that the states should have broad freedom in establishing their own eligibility criteria so long as the requirements of the Social Security Act were met. Where Congress has so specifically given the states such broad authority, and especially where that authority has been granted in an area that Congress realized would implicate rights and obligations under the NLRA, it is incumbent upon the Appellants to show that Congress intended to withhold from that broad grant of power the right to disqualify those whose Section 7 activities cause their own unemployment. Indeed, this conclusion is all the more compelling because of the labor preemption conundrum mentioned earlier. Where *either* the grant or denial of benefits will conflict with some aspect of the NLRA, presumptions of preemption based on conflict with that Act make no sense because the only alternative course available to a state would also conflict with that statute. In these circumstances, the Court must look to the Social Security Act for any presumption to be applied, and that statute's broad grant of authority, along with its admitted failure to prescribe labor dispute eligibility criteria for states, require the conclusion that Congress intended states to be free to enact provisions such as the MESA financing disqualification.

ARGUMENT

CONGRESS INTENDED THAT STATE UNEMPLOYMENT COMPENSATION STATUTES MAY DISQUALIFY CLAIMANTS WHOSE SECTION 7 ACTIVITIES IN A LABOR DISPUTE CONTRIBUTE TO THEIR OWN UNEMPLOYMENT

A. Introduction

In this case the Court is called upon once again to determine the permissible scope of state action at the intersection of the 1935 National Labor Relations Act and state unemployment compensation statutes enacted pursuant to Title IX of the 1935 Social Security Act.[12] As in *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519 (1979) (*"New York Telephone"*), the issues here arise in the context of a labor dispute in which a union has resorted to "economic warfare"—i.e., strikes—in an effort to force an employer to accede to the union's bargaining demands.[13] Unlike *New*

[12] 49 Stat. 639, amended and recodified as the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301 *et seq.*, 42 U.S.C. §§ 501 *et seq.*, §§ 1101 *et seq.*

Title IX created a cooperative federal/state unemployment program by enacting a system of tax incentives which would put pressure on all states to enact their own unemployment compensation statutes. Basically, the statute imposed a federal tax on the payrolls of private employers, but provided a credit for such taxes for payments made to state unemployment compensation funds. In order to gain that credit, however, and in order for the state to receive federal funds for administering their unemployment systems, the state systems had to meet the requirements set forth in Title IX and be approved by the Social Security Board. *See generally, Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 482-487 (1977); *New York Telephone*, 440 U.S. at 536-540, 544 n.43; *McKay v. Horn*, 529 F. Supp. 847, 850-851 (D.N.J. 1981).

[13] The Court's other labor preemption decision involving state unemployment compensation, *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), did not involve the parties to a bargaining dispute. As we show later in the text, this fact constitutes one of the critical distinctions between *Nash* and the present case.

York Telephone, however, where the issue was whether states may *grant* unemployment compensation to the strikers involved in such bargaining disputes, the present case presents the question whether states may *deny* compensation to employees involved in such disputes. Specifically, the issue is whether Michigan may deny unemployment benefits to employees who have knowingly and meaningfully contributed to their own unemployment by financing the very strikes in sister plants that they realized could put them out of work.

General Motors submits, and shows in Section B below, that *New York Telephone* requires affirmance of the Michigan Supreme Court because *granting* unemployment benefits to strike financers in Michigan would create just the sort of conflict with the NLRA that all members of this Court found in *New York Telephone*. That is, granting such benetfis would significantly enhance the UAW's strike weapon in its bargaining disputes with GM by shifting the natural economic consequences of such strikes from the UAW, its members and their strike fund, to General Motors. Accordingly, the statutory scheme proposed by Appellants (i.e., granting unemployment benefits) would conflict with the NLRA by altering the balance of bargaining power created by Congress, and it would thus normally be preempted by that federal statute under the "*Machinists* branch" of the labor preemption doctrine.[14]

[14] Named for the case in which it was first most explicitly enunciated, *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), the *Machinists* doctrine prohibits states from intervening in a labor dispute or the collective bargaining process to aid one of the parties. The doctrine is premised upon the recognition that, in enacting the NLRA, Congress itself "equitably and delicately structur[ed] the balance of power among competing forces so as to further the common good." *New York Telephone*, 440 U.S. at 552 (dissent), *quoting Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286 (1971). Thus, of the myriad activities that labor and management may take

Appellants, on the other hand, approach this case from a different angle. They argue that financially "assisting" a union is one of the rights protected by Section 7 of the NLRA [15] and that the MESA provision disqualifying persons who finance the strike causing their own unemployment interferes with that Section 7 right. Thus, according to Appellants, *denying* unemployment benefits conflicts with the NLRA by impinging on Section 7 rights and would normally be preempted under the *Garmon* branch of the labor preemption doctrine.[16]

As shown by these respective positions of the parties, the interface of the NLRA and state labor dispute disqualifications from unemployment compensation creates a basic conundrum in terms of the labor preemption doctrine. On the one hand, there may, in fact, be said to be at least a facial conflict between Section 7 of the NLRA and a state statute that denies unemployment compensation to claimants who strike or who "financially assist" the strike that causes their unemployment. On the

---

in support of their bargaining positions, Congress determined that some of those activities should be prohibited, some should be protected, and the remainder should be left "to be controlled by the free play of economic forces." *Machinists*, 427 U.S. at 140 & n.4. As to the last category, neither the National Labor Relations Board nor a state is free to interfere with that free play of economic forces or to "introduce some standard of properly 'balanced' bargaining power" into the labor-management arena. *Id.* at 149-150, *quoting NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 497 (1960).

[15] Section 7 of the NLRA, 29 U.S.C. § 157, gives employees

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

[16] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), which gives this preemption branch its name, normally prohibits state regulation or interference with rights actually or arguably protected or prohibited by the NLRA.

other hand, it must also be acknowledged that the payment of unemployment compensation to those individuals in the context of a labor dispute involving their own employer inevitably alters the balance of power under the NLRA by significantly enhancing the union's strike weapon. Thus, either course a state chooses may offend *some* basic principle of the NLRA.

In these circumstances, the Court cannot really follow its usual and proper route of looking to the NLRA to divine Congress' intent in a labor preemption case, for both possible alternatives open to a state arguably conflict with that statute. Rather, the Court must look to the Social Security Act, in which Congress specifically dealt with the issue of what freedom states should have in enacting unemployment compensation statutes. And as we demonstrate in Section C below, the history and provisions of that statute show that Congress intended the states to have full freedom to enact whatever labor dispute disqualifications they wish.

B. Invalidation Of The MESA Financing Provision Would Pose A Conflict With The NLRA's Balance Of Bargaining Power

As pointed out in the Introduction, this Court's *New York Telephone* decision involved a state unemployment compensation statute which could be deemed the "flip side" of the Michigan statute being challenged here.[17] The first issue before the Court was whether the New York statute *granting* unemployment benefits to strikers conflicted with the National Labor Relations Act because it altered the balance of bargaining power between labor and management that Congress had struck when it en-

---

[17] Like the statute considered in *New York Telephone* (see 440 U.S. at 523-524), the Michigan unemployment compensation system is financed primarily by employer contributions based on benefits paid to the employer's employees in past years. MCLA §§ 421.13 *et seq.* Hence, the cost of unemployment benefits for Appellants would ultimately have been borne by General Motors.

acted that statute in 1935. The second issue in *New York Telephone* was whether, if a conflict existed, Congress' enactment of the Social Security Act nevertheless demonstrated Congress' intent that the states were free to act in this area.

In considering the first issue, all members of this Court found that granting unemployment benefits to strikers conflicted with the NLRA by altering the balance of power that Congress prescribed by that federal statute. *New York Telephone*, 440 U.S. at 531-532, 547, 548-549, 551, 555-556.[18] Significantly, moreover, the Court premised this conclusion *not* on the history of the Social Security Act, but on the requirements of the NLRA itself. For example, the plurality found that the New York statute "has altered the economic balance between labor and management" because of its "twofold impact . . . which not only provides financial support to striking employees but also adds to the burdens of the struck employers. . . ." 440 U.S. at 531-532.[19] Similarly, Justices Blackmun and Marshall, concurring, found that New York's payment of unemployment benefits to strikers "does indeed alter the economic balance between labor and management" (440 U.S. at 547) because states "are *not* free . . . directly to enhance the self-help capability of one of the parties to such a [labor] dispute so as to result in a significant shift in the balance of bargaining power struck by Congress." 440 U.S. at 548-549 (emphasis in original). Finally, the dissenting Justices found that the New York statute "substantially alters . . . the balance of advantage between management and labor prescribed by the National Labor Relations Act" (440 U.S. at 551) because it "substantially cushioned the economic impact of the lengthy strike on the striking employees, and also made the strike more expensive for employers." 440 U.S. at 555-556 (footnote omitted).

[18] Only Justice Brennan, concurring, did not explicitly make such a finding. It appears that he agreed with the other Justices, however, for he relied on the legislative history of the Social Security Act in joining the plurality's conclusion that Congress intended that states be free to make their own decisions with regard to granting or denying unemployment benefits. 440 U.S. at 546-547.

[19] The plurality had previously noted that, in terms of impact on the bargaining balance, "it makes little difference . . . whether the result of the unemployment scheme is simply to provide payments to striking workers, or simply to exact payments from struck employers, or some of both." 440 U.S. at 526 n.5.

In short, insofar as the requirements of the *NLRA itself* are concerned, all members of the Court in *New York Telephone* ruled that a state may not structure its unemployment compensation system so as to enhance a union's strike weapon by either mitigating the natural economic effects of the strike on the union and its members or by increasing the strike's economic detriment to employers.[20]

There are at least three reasons why this basic principle is important in the instant case. First, it cannot be argued that this case is different from *New York Telephone* because the MESA financing disqualification impinges upon a Section 7 right of the Appellants—the right "to assist" their union. The employees in *New York Telephone* were exercising the quintessential Section 7 right—the right to strike—and yet the members of this Court concluded that *denial* of unemployment benefits to those employees was required by the NLRA, but for the Social Security Act. Thus, at the very least, *New York Telephone* stands for the proposition that the NLRA itself may countenance intrusion upon Section 7 rights through the denial of unemployment benefits where

[20] Of course, six members of the *New York Telephone* Court ultimately concluded that the legislative history of the Social Security Act indicated Congress' intent to tolerate this conflict with the NLRA which was posed by the New York statute. We deal with this aspect of the *New York Telephone* decision in Section C, *infra*.

the grant of such benefits would alter the balance of bargaining power under that statute.[21]

Second, under the *New York Telephone* rationale there is no analytically sound reason to distinguish between the denial of unemployment compensation to employees who have contributed to their own unemployment by exercising the Section 7 right to strike and employees who have contributed to their own unemployment by exercising the Section 7 right to finance the strike which causes their unemployment. In either case, granting unemployment benefits to the employees will significantly increase the cost of the strike to their employers via the unemployment compensation tax, and thus will significantly enhance the union's strike weapon.[22] Moreover, in

[21] The Appellants correctly note that the plurality in *New York Telephone* observed that that case did not involve "any claim of interference with employee rights protected by § 7." 440 U.S. at 529. That statement, however, was made in the context of the plurality's explanation of why that case did not fall within "the cases comprising the main body of labor pre-emption law . . ."—the so-called *"Garmon"* preemption doctrine. *Id.* at 529-530. Moreover, the plurality's observation does not alter the fact that, insofar as the requirements of the NLRA itself are concerned, every member of this Court concluded that unemployment benefits must be denied to strikers—a circumstance that would pose precisely the same "interference with Section 7 rights" that the Appellants allege herein. Nor is this conclusion changed by the fact that *New York Telephone* was decided under the *Machinists* branch of the labor preemption doctrine. The intent of Congress in the NLRA does not change depending upon the branch of the preemption doctrine being applied.

In any event, as we show in Section C, *infra*, whatever the "conflict" with the NLRA created by the Michigan statute or any other unemployment compensation statute denying benefits to persons unemployed as a result of a strike, Congress decided to tolerate that conflict when it enacted the Social Security Act.

[22] The Court recognized this principle both in *New York Telephone* (see n.19, *supra*) and in *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977) (*"Hodory"*). The unemployment compensation statute before the Court in *Hodory* disqualified all employees whose unemployment was due to a labor dispute, irrespective of whether those employees were involved in the labor dispute or were merely laid off as a result of the dispute. In response to such a laid-off employee's contention that this scheme violated the Equal Protection Clause, the Court acknowledged that the State had offered a rational justification in its position that the "granting of benefits [to laid-off employees] would place the employer at an unfair advantage in negotiating with the unions." 431 U.S. at 492. According to the Court:

> The employer's costs go up with every laid-off worker who is qualified to collect unemployment. The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike.

431 U.S. at 492.

either case, granting unemployment compensation will cushion the economic impact of the strike on the union's own members, at least in situations where, as here, the "financers" are members of the same union which is conducting the strike. Indeed, this impact is even more pronounced in the instant case, for the record reflects that the Appellants here were poised to receive strike benefits under the UAW's "layoff loan" program (see n. 3, *supra*) if their unemployment compensation claims were denied (see Michigan Supreme Court Appendix at 39a, 40a, 61a, 63a-64a, 74a-75a, 226a, 94b, 104b-115b). Thus, if the MESA financing provision is preempted, the responsibility for financially supporting these Appellants during the GM strikes they finance will be shifted from the UAW's strike fund to the GM-financed unemployment compensation fund. This, in turn, will produce just the sort of unemployment compensation system in Michigan that the Court found inconsistent with the NLRA in *New York Telephone*—i.e., one that enhances the UAW's strike weapon by softening the economic burden of the strike on the Union and its members and by placing the burden squarely on the shoulders of their employer, General Motors.

The bargaining power that this sort of burden-shifting gives the UAW is phenomenal. If the MESA financing provision is invalidated, the UAW will be able to build up its strike fund by calling upon its members throughout the United States, and it will be able to reserve the fund only for members who actually strike. Indeed, with the strike fund focused only on paying strikers, the UAW could probably accumulate sufficient funds to pay a substantial portion of the strikers' unpaid wages. At the same time, by striking linchpin plants in the integrated automobile production system, the Union could virtually shut down the entire production operations of GM—a shutdown which, under Appellants' proposed scenario, would require GM to provide those employees with wage substitutes in the form of unemployment compensation. The bottom line would be the equivalent of a virtually cost-free national strike for the UAW and the multi-million dollar financing of that strike by GM. The distortion of the NLRA's balance of bargaining power produced by this scenario is clear. The strike-caused loss of production at integrated plants may well be the normal economic consequence of a strike which employers must bear. However, Congress certainly never intended to *require* that struck employers subsidize the strikes by providing those laid-off employees with wage substitutes.[23]

Third, and finally, the underlying premise of *New York Telephone* demonstrates one of the two reasons why

[23] It is for this reason that the Court should not lend a sympathetic ear to the Appellants' contention that the MESA financing provision alters the economic balance between labor and management by interfering with *the UAW's* economic weapons. See Appellants' Brief at 20-21. Although Appellants contend that the Michigan provision interferes with their union's ability "to marshall its financial resources in support of collective bargaining" by building up its strike fund (Appellants' Brief at 12, 20-21), what they are really complaining about is that Michigan has not structured its unemployment compensation system in such a way as to enhance their economic weapons by shifting the economic costs of their strike from their strike fund to the employer, General Motors.

Appellants are mistaken in arguing that this Court's decision in *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), requires preemption in the instant case. In *Nash* the Court considered a ruling that Florida's labor dispute disqualification should be applied to deny benefits to an employee who filed an NLRB unfair labor practice charge against her employer. Unlike the instant case, however, and unlike *New York Telephone*, *Nash* did not involve the exercise of any Section 7 rights in support of a union's bargaining position. Thus, the Court did not have to consider the effect of granting or denying unemployment benefits on the balance of economic forces that underlies the NLRA. Accordingly, even if *Nash* had been decided on the ground that a state may not interfere with individual employee Section 7 rights (e.g., the right not to be discharged for joining a union, the right to file NLRB charges, etc.), that decision has no bearing on cases involving the exercise of Section 7 rights in support of ongoing labor disputes where the grant of unemployment benefits substantially alters the economic balance in a strike to favor the union and employees and to disadvantage the employer.[24]

[24] *Nash* is distinguishable for a more fundamental reason—it was not decided on the basis of interference with Section 7 rights. Rather, the Court based its preemption decision on its undoubtedly correct conclusion that Florida's interpretation would "'frustrate' enforcement of the National Labor Relations Act." 389 U.S. at 237-238. According to the Court:

> Implementation of the Act is dependent upon the initiative of individual persons who must . . . invoke its sanctions through filing an unfair labor practice charge. . . . It appears obvious to us that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action. . . . States [are] devoid of power "to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

Id. at 238, 239, 240, *quoting McCulloch v. Maryland*, 4 Wheat. 316, 436, 4 L. Ed. 579, 609 (1819) (footnotes omitted). Thus, the Court

In sum, the Michigan financing disqualification is necessary if the balance of bargaining power created by the NLRA is to be maintained. Indeed, with the exception of state statutes which deny benefits to *all* employees out of work due to a strike against their employer, it would be difficult to find a state unemployment compensation statute which more carefully avoids state intervention in the collective bargaining process.[25] However, these broader statutes gain that NLRA consistency at the expense of the fundamental purpose underlying Congress' 1935 Social Security Act—providing wage substitutes during "a period of unemployment not the fault of the employee" (*California Dept. of Human Resources Development v. Java*, 402 U.S. 121, 130 (1971))—because some employees out of work due to a strike may not have even the slightest connection with the striking employees or their labor dispute. The State of Michigan, on the other hand, has sought to accommodate both federal statutes by enacting a narrower labor dispute provision which leaves with striking unions and their members the normal economic consequences of their strikes (rather than shifting those costs to the struck employer), but only in situations where the out-of-work employees bear some responsibility for their own unemployment. In short, Michigan has carved with a scalpel rather than an ax to ensure unemployment compensation benefits to those who are unemployed through no fault of their own while at the same time minimizing the State's intrusion into the bargaining process and the balance of economic power prescribed by the NLRA. In

premised its *Nash* conclusion on the fact that the NLRA itself could not be effectively enforced if the Florida interpretation were allowed to stand.

[25] Only by disqualifying all employees out of work as a result of a strike against their employer can a state completely avoid strengthening the striking union's hand by magnifying the adverse economic impact on the employer through the unemployment compensation system.

these circumstances, it would be ironic indeed for this Court to hold Michigan's statute preempted by the NLRA, especially where acceptance of Appellants' position would create a *greater* conflict with that statute by increasing the State's intrusion into the bargaining process in the manner identified by this Court in *New York Telephone.*

C. To The Extent There Is A Conflict With The NLRA, Congress Intended To Permit Michigan To Act As It Has

As pointed out in the Introduction, Appellants approach this case from a different angle from that applied in *New York Telephone.* They argue that because Michigan denies benefits to employees who finance strikes causing their own unemployment, the State thereby interferes with the employees' Section 7 right financially "to assist" their union. Relying upon the *Garmon* branch of preemption, Appellants contend that the Michigan statute must therefore be preempted because there is no evidence of a "particularized intention" (Appellants' Brief at 22) by Congress to tolerate the states' interference with that *specific* Section 7 right—i.e., the right to financially assist a union.[26] And they seem to rely exclusively on this analysis, because they admittedly can point to no congressional statement or action which affirmatively shows that Congress intended to prohibit the states from disqualifying strike financers from unemployment benefits.

[26] Appellants recognize, as they must, that simply because a state statute appears to interfere with a Section 7 right does not mean the statute is preempted. If it can be shown that Congress elsewhere indicated that the states are free to act (even in facial conflict with Section 7 rights), then the statute is not preempted because there is no real conflict with Section 7 in terms of congressional intent. See *Brown v. Hotel and Restaurant Employees Union*, —— U.S. ——, 82 L. Ed. 2d 373 (1984).

We submit that there are at least three reasons why Appellants' preemption presumption and preemption conclusion are wrong. First, under the narrow and unusual circumstances presented by Congress' concomitant enactment of the NLRA and Title IX of the Social Security Act ("SSA"), any otherwise applicable presumption of preemption based on the NLRA should be reversed, at least with respect to states' choice of disqualification criteria for employees out of work because of a labor dispute involving their own employer. Thus, it is incumbent upon Appellants to show that Congress intended to except disqualification based on Section 7 activities in such a labor dispute from the broad mandate the SSA gave states to establish their own eligibility criteria. Appellants have not met and cannot meet that burden in this case. Second, even assuming arguendo that the NLRA creates a "presumption of preemption" in this case, nothing in this Court's decisions would require General Motors to demonstrate congressional intent regarding financing disqualifications specifically, as opposed to congressional intent generally with respect to the states' treatment of employees whose Section 7 activities in a labor dispute cause their own unemployment. Finally, no matter what the presumption in this case (i.e., preemption or no preemption), the Social Security Act and its legislative history demonstrate that Congress did, indeed, intend that the states should be free to disqualify employees whose Section 7 activities in support of a labor dispute with their employer contribute to their own unemployment.

We deal with each of these issues below, but we do so in reverse order because, as this Court concluded in *New York Telephone*, the legislative history of the SSA forms the predicate for any preemption decision in this area, and it is the specific basis for the conclusion in this case that the MESA financing provision is not preempted absent an indication of congressional intent to the contrary.

"The purpose of Congress is the ultimate touchstone" in labor preemption analysis,[27] and congressional purpose vis-a-vis labor dispute disqualifications in state unemployment compensation statutes has been thoroughly reviewed both by this Court, in *New York Telephone* and *Hodory*, and by the Michigan Supreme Court in its opinion below (J.S. 64a-69a). As those discussions make clear, the evidence of Congress' intent comes primarily from the passage and implementation of Title IX of the Social Security Act just a few weeks after the NLRA was enacted in 1935. When Congress enacted the SSA it undoubtedly realized that employees' exercise of the rights guaranteed in Section 7 of the NLRA would often take place in the context of a labor dispute, and that those labor disputes, in turn, would cause unemployment. Similarly, Congress was also aware of the possible impact of unemployment compensation on the bargaining process and the balance of power it was seeking to establish in the NLRA. *New York Telephone*, 440 U.S. at 544. Congress, however, chose not to enter the fray by prescribing how state unemployment statutes should deal with these matters. Instead, it left to the individual states the question of the availability of benefits for employees out of work because of a labor dispute. *Hodory*, 431 U.S. at 488-489. And, as the Michigan Supreme Court correctly held in this case, the freedom thus deliberately left the states included the freedom to decide whether or not unemployment benefits should be denied to claimants who have contributed to their own unemployment by financing the strikes that caused it. Support for this conclusion comes from numerous sources.

Initially, it is clear and undisputed that the Social Security Act and its legislative history demonstrate Congress' intent to give the states virtually complete authority to determine their own eligibility criteria for

---

[27] *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), *quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963).

unemployment compensation. *New York Telephone*, 440 U.S. at 537, 538 (plurality); *Hodory*, 431 U.S. at 482-484. Indeed, the Report of the Committee on Economic Security, which "became the cornerstone of the Social Security Act" (*Hodory*, 431 U.S. at 482), provided that the "plan for unemployment compensation . . . contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish." [28] Further, the Senate Report accompanying the Social Security Act noted that "[e]xcept for a few standards [in the Act] . . . the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." S. Rep. No. 628, 74th Cong., 1st Sess. 13 (1935).

Significantly, moreover, *New York Telephone* teaches that the states' "broad freedom" to set eligibility standards includes the freedom to disqualify claimants who are unemployed because they have exercised Section 7 rights—there the right to strike. Indeed, Congress itself chose this route for the District of Columbia, over which it exercised plenary authority in a manner akin to a state legislature:

> [J]ust two weeks after the Social Security Act became law Congress, in its capacity as the legislature for the District of Columbia, passed an unemployment program for that locality which expressly precluded strikers from receiving benefits so long as their labor dispute was in "active progress." Act of Aug. 28, 1935, Ch. 794, § 10(a), 49 Stat. 950.

New York Telephone, 440 U.S. at 543 n. 41. In this case the Michigan court correctly concluded that, by this act, "Congress indicated that it did not consider the rights mentioned in § 7 of the NLRA involving a right to strike as prohibiting a conflicting disqualifying provi-

[28] Report of the Committee on Economic Security, reprinted in Hearings on S. 1130 before the Senate Committee on Finance, 74th Cong., 1st Sess. 1311, 1326 (1935).

sion of the 'state' unemployment compensation law" (J.S. 67a).

There is equally significant affirmative evidence that this freedom was to extend to the disqualification of employees who contribute to their own unemployment by financing a strike that results in that unemployment. This evidence comes from the contemporaneous interpretations of Title IX by the Social Security Board, the administrative agency created by the Social Security Act and charged with qualifying state unemployment statutes for federal funds. See *New York Telephone*, 440 U.S. at 544 n. 43. In order to assist the states in writing acceptable unemployment compensation statutes, the Board issued two "draft bills" which, although not mandatory, would be acceptable forms of state legislation. Both draft bills provided that an employee out of work because of a labor dispute would be disqualified from receiving unemployment benefits unless it could be shown that the employee "is not participating in *or financing* or directly interested in the labor dispute which caused the stoppage of work" (emphasis added).[29] Thus, the Social Security Board not only qualified the Michigan statute (see *New York Telephone*, 440 U.S. at 544 n. 43), but it also issued a contemporaneous interpretation of the Social Security Act affirmatively indicating to all states that disqualification for financing was consistent with the intent of Congress.[30] And so far as

[29] Draft Bills for State Unemployment Compensation of Pooled Fund and Employer Reserve Types, Prepared by the Social Security Board, Washington, D.C., January 1936. The cover of the draft bills stated that although the bills met the requirements of the SSA, they should not be considered "model" bills or even recommended bills "in keeping with the policy of the Social Security Board of recognizing that it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted." *Hodory*, 431 U.S. at 484-485.

[30] Appellants contend that these draft bills have little probative value because the Social Security Board had no particular knowledge

Congress itself has indicated, such a provision remains consistent with its intent. During the 50 years that the NLRA and the Social Security Act have coexisted, at least 31 state unemployment statutes have included provisions which disqualify employees who have financed the strike causing their unemployment (see n. 7, *supra*). Nevertheless, and despite intervening congressional attention to the NLRA and to the question of labor dispute disqualifications under unemployment compensation statutes,[31] Congress has never suggested that a financing disqualification is in any way inconsistent with its labor laws.

Finally, and perhaps most importantly, the limitations on state programs that *were* imposed in the Social Security Act demonstrate that when Congress wished to impose an eligibility criterion to protect employees' rights under the NLRA, it expressly provided for that protec-

---

of labor law and because in 1940 the Board deleted the financing disqualification inasmuch as "it might operate to disqualify an individual not concerned with a dispute solely on the basis of his payment of dues to the union that is conducting the strike." (Appellants' Brief at 28-29) Neither of these contentions has merit. This Court has previously recognized that contemporaneous interpretations by the Social Security Board are relevant to whether a state's unemployment compensation statute is preempted by the NLRA. *New York Telephone*, 440 U.S. at 544 n.43. Moreover, the Michigan financing provision is drawn so as to avoid the concern that caused the Social Security Board to delete the financing provision from the draft bills in 1940—it exempts from disqualification financing that is in the form of regular union dues, even if a portion of those dues is allocated to a strike fund. See n.10, *supra*.

[31] As noted in *New York Telephone*, 440 U.S. at 544 n.44, Congress has twice considered and rejected amendments that would exclude strikers from receiving unemployment compensation. In fact, one of those proposals would have amended the NLRA, which is alleged to have preemptive effect here. The proposal was later deleted after being criticized because "[u]nder the Social Security Act, . . . the determination [of eligibility] was advisedly left to the States." H.R. Rep. No. 245, 80th Cong., 1st Sess. 68 (1947), quoted in *New York Telephone*, 440 U.S. at 544 n.44.

tion. *Hodory*, 431 U.S. at 488-489 & n. 16; *New York Telephone*, 440 U.S. at 537-538. In particular, Congress chose to forbid states from disqualifying unemployment compensation claimants on the basis of their refusal to accept *new work* if the position offered is vacant because of a labor dispute or if the claimant would be required to join a "company union" or refrain from joining a bona fide union as a condition of employment.[32] These provisions led the Court in *Hodory* to conclude:

> The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that neither the Social Security Act nor the Federal Unemployment Tax Act was intended to restrict the States' freedom to legislate in this area.

431 U.S. at 488-489.

These statutory provisions are equally pertinent here for two reasons. First, they are persuasive evidence that in the area of unemployment compensation, Congress intended the broad freedom granted the states in the Social Security Act to supersede, rather than be subject to, the NLRA. For if Congress had intended that the NLRA's Section 7 rights be superimposed on the unemployment compensation system, there would have been

---

[32] From its inception, the Social Security Act has contained the following limitations on states' eligibility criteria (*Hodory*, 431 U.S. at 488 n.16):

> (5) compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> * * * *
>
> (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

26 U.S.C. § 3304(a)(5).

no need to enact these specific provisions protecting those rights with respect to "new work."

Second, by imposing these NLRA-related disqualification restrictions only *outside* the context of labor disputes involving a claimant's own employer, Congress implicitly indicated its intent *not* to impose them *within* the context of such disputes. There is, of course, a logical and persuasive reason why Congress would have desired this differentiation. Outside the context of a labor dispute involving a claimant's own employer, the granting of unemployment benefits would not aid either party to a labor dispute, and thus would not interfere with the free play of economic forces which Congress in the NLRA intended to govern the outcome of such disputes (see Section B, *supra*). Where employees have exercised Section 7 rights in support of a labor dispute with their own employer, however, and where the exercise of those rights has itself contributed to the employees' unemployment, prohibiting state disqualification might make the exercise of Section 7 rights more attractive, but it would be at the expense of the free play of economic forces prescribed in the NLRA. Seen in this light, the Social Security Act's differential handling (silence versus prescription) regarding states' treatment of Section 7 rights in different contexts supports the conclusion that Congress meant to prevent the states from infringing on Section 7 rights when there were no countervailing NLRA considerations involved, but to let states "make the call" when *any* decision made with respect to benefits would intrude on *some* NLRA policy.

In sum, it is clear that Congress intended that states be free to disqualify persons who have contributed to their own unemployment by financing the very strike that caused it. Such a disqualification falls within the broad freedom given the states under Title IX of the Social Security Act, was actually prescribed by the body created to administer that provision, is not materially

different from a provision denying benefits to those who exercise the Section 7 right to strike, and has been a congressionally unchallenged feature of most states' unemployment systems for 50 years. Moreover, Congress has itself carved out those areas in which the NLRA should take precedence over the freedom given the states under the SSA. Thus, the MESA financing disqualification should be permitted to stand even if, in a sense, it can be said to "conflict" with one aspect of the NLRA.

Despite all this evidence, however, Appellants suggest that this conclusion cannot be drawn unless General Motors can identify something that shows Congress' "particularized intention" to tolerate financing disqualifications specifically rather than an intention to leave the question of labor dispute disqualifications generally to the states (Appellants' Brief at 22, 24-26). We think the Appellants are wrong for two reasons.

First, there is nothing in *New York Telephone* or this Court's other decisions to suggest that NLRA preemption is mandated unless there is specific evidence of congressional intent to permit disqualification based on the *particular* Section 7 right in issue. Indeed, logic would dictate that if Congress intended that the states may disqualify claimants who have caused their own unemployment by exercising the most fundamental Section 7 right —the right to strike—they may also disqualify claimants for causing their own unemployment by financing the strike that results in their unemployment. Thus, even if conflict with the NLRA normally results in a "presumption of preemption" which must be overcome by evidence of contrary congressional intent, that presumption certainly is rebutted by evidence that Congress intended to permit states to decide whether to disqualify claimants who are unemployed due to a labor dispute in which they themselves have somehow participated. Such evidence would include all the matters considered in *New York Telephone*, and the evidence would dictate the same conclusion here that the Court reached there.

Second, we submit that a presumption of preemption should not apply in the particular facts of this case and in other cases involving disqualification of employees who have contributed to their own unemployment by exercising Section 7 rights in support of a labor dispute with their own employer. In this regard, General Motors does not quarrel with the general proposition that state laws which conflict with the NLRA are presumptively preempted where Congress has not otherwise legislated with respect to state action in a particular area. In such situations courts must rely on the general presumption that Congress intended the states to do nothing to interfere with the balance and rights created in that statute. However, where Congress has elsewhere affirmatively given the states a broad mandate to act in a particular area, then one cannot presume that Congress intended the NLRA to supersede that broad mandate, rather than *vice versa*. On the contrary, if that broad mandate is granted the states in an area such as unemployment compensation, where Congress inevitably knew that the states would act upon facts which would implicate the NLRA (i.e., unemployment due to labor disputes), one must presume that Congress intended the states to proceed without respect to the NLRA implications unless there is an affirmative indication that Congress intended the state action to be circumscribed, nevertheless, by that statute. See *Malone v. White Motor Corp.*, 435 U.S. 497, 505, 511 (1978) (The federal Welfare and Pension Plans Disclosure Act, which was "envisioned as laying a foundation for future state regulation," is "a far more reliable indicium [than the NLRA] of congressional intent with respect to state authority to regulate pension plans. . . .").[33]

[33] According to the Court in *Malone*, there was no doubt that "the Congress which adopted the Disclosure Act recognized that it was legislating with respect to pension funds many of which had been established by collective bargaining." 435 U.S. at 507. Thus, although the *Machinists* preemption doctrine normally prohibits states from interfering with the bargaining process or dictating

Accordingly, under the Social Security Act's broad mandate for states to set their own eligibility criteria, including those to be applied with respect to labor disputes necessarily implicating Section 7 rights, states should be presumptively free to act *unless* the SSA or its legislative history clearly shows that Congress meant *to exclude* that area from permissible state action.

The plurality in *New York Telephone* recognized this same principle when it emphasized that the broad freedom given the states to fashion their own eligibility criteria under the Social Security Act made the states' unemployment compensation statutes "analogous [to] state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility.'" 440 U.S. at 540, *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). Thus, the plurality concluded that, like those "deeply rooted" state statutes, the states' labor dispute disqualifications should not be preempted absent "compelling congressional direction" that "Congress had deprived the States of the power to act." *Id.*

The concurring and dissenting Justices declined to adopt the plurality's presumption.[34] However, most of the

the outcome thereof, Congress' "contemplat[ion] that the primary responsibility for developing . . . 'mandatory standards' would lie with the States" meant that "Congress could not have intended that bargained for plans . . . were to be free from either state or federal regulation insofar as their substantive provisions were concerned." *Id.* at 512.

[34] Justice Brennan found "substance" in the plurality's "conclusion that the legislative history of the Social Security Act supports the argument that New York's law should be accorded a deference not unlike that accorded state laws touching interests deeply rooted in local feeling and responsibility." 440 U.S. at 546 n.*. Nevertheless, he found it unnecessary to decide that question since, under any mode of analysis, he believed that the legislative history of the Social Security Act adequately demonstrated Congress' intent to leave eligibility decisions in strike situations to the states. 440 U.S. at 546-547.

Justices appeared to base their position on their disagreement with the plurality's concomitant reliance on the New York statute's asserted "general applicability" and on what appeared to be their concern that the plurality was seeking to expand the "deeply rooted local interest" exception to the *Garmon* preemption doctrine.[35] We submit, however, that the Court need not here be concerned about possibly expanding the "deeply rooted local interest" exception to labor preemption. That exception has been applied in the past as a *judicial* presumption based upon the nature of the state interest involved—i.e., in areas of deeply rooted local interests such as violence, public order and personal torts. On these subjects the Court has refused to infer that Congress intended the NLRA to deprive the states of the power to act unless there is a specific congressional direction to the contrary. *Garmon, supra*, 359 U.S. at 244. Here, however, we do not urge any expansion of those narrow areas of "deeply rooted local interests" previously recognized by the Court. Rather, it is unnecessary to do any weighing or considering of local interests, for Congress itself, in enacting the Social Security Act, has specifically granted the states broad, plenary powers to set their own eligibility criteria. Thus, although the analysis proposed by the *New York Telephone* plurality may be "analogous" to that in cases involving "deeply rooted local interests," it does not open the door for state and federal courts to decide for themselves what "local interests" are of sufficient

---

[35] See, e.g., the concurring opinion of Justice Blackmun, joined by Justice Marshall (440 U.S. at 548, 550-551), and the dissenting opinion of Justice Powell, joined by the Chief Justice and Justice Stewart (440 U.S. at 557-560). Apparently these Justices were concerned with the aspects of the plurality's analysis that could potentially result in a broad exception to established preemption principles ("general applicability") or that could significantly broaden an existing, narrow "local interest" exception. As we show in the text, however, the part of the plurality's analysis upon which we rely would not present those potential problems in this case.

magnitude to fall within the narrow preemption exception previously recognized by this Court.

In sum, where Congress itself has granted the states broad freedom to act in a particular area (e.g., setting eligibility criteria for unemployment compensation), then Congress should be deemed to mean what it says unless there is specific evidence that Congress meant to exclude certain state actions from that broad freedom. And that conclusion is particularly compelling where, as in the Social Security Act, Congress *did* expressly exclude certain state actions when it deemed such exclusions necessary to protect employee rights under the just-enacted NLRA (see n. 32, *supra*, and accompanying text).

Moreover, support for this conclusion is found in this Court's recent decision in *Brown v. Hotel and Restaurant Employees Union*, 82 L. Ed. 2d 373 (1984), where, as here, a state statute was challenged on the ground that it posed a "direct conflict" with employees' Section 7 rights under the NLRA. The union in *Brown* contended that the New Jersey Casino Control Act, which established qualification criteria for officials of unions representing employees in the gambling industry, interfered with employees' right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Despite what was an obvious facial conflict between Section 7 and the New Jersey statute, this Court determined that the latter statute was not preempted. The Court relied on two factors supporting this conclusion. First, the 1959 Labor-Management Reporting and Disclosure Act (LMRDA), which itself imposed restrictions on union officials, indicated that Congress did not intend the right of employees to select union officers be absolute, and the disclaimer of preemption in that statute indicated that "Congress necessarily intended to preserve *some* room for state action. . . ." 82 L. Ed. 2d at 386 (emphasis in original). Second, the Court relied on the fact Congress had also previously approved a bi-state compact which

anticipated some similar state regulation on the New York Waterfront. *Id.* at 387-388. These facts led the Court to conclude:

> Congress has at least indicated both [1] that employees do not have an unqualified right to choose their union officials and [2] that certain state disqualification requirements are compatible with § 7. . . . *In the absence of a more specific congressional intent to the contrary,* we therefore conclude that New Jersey's regulation . . . does not actually conflict with § 7 and so is not preempted by the NLRA.

82 L. Ed. 2d at 388 (emphasis added).[36]

This conclusion can be adopted virtually unchanged in the instant case. In view of this Court's determination in *New York Telephone* that Congress intended states to be free to grant or deny unemployment compensation to strikers, it can at least be concluded: (1) that employees do not have an unqualified right to unemployment compensation even though their disqualification is occasioned by the exercise of a Section 7 right (there the right to strike); and (2) that certain state disqualifications caused by Section 7 activity are nevertheless compatible with Section 7. Accordingly, as in *Brown*, the Appellants must produce "a more specific congressional intent to the contrary" (*Brown*, 82 L. Ed. 2d at 388) in order to sustain their claim of preemption—a burden which Appellants admittedly cannot meet in this case.

---

[36] Although the Court couched its conclusion in terms of finding no conflict with Section 7, it is clear that the Court was engaged in traditional preemption analysis: the Court found a facial conflict with Section 7 but looked elsewhere for indicia of congressional intent that the state's action be permitted. Furthermore, any determination that a state action is not preempted by the NLRA can be viewed as an ultimate conclusion that there is no conflict with that federal statute because Congress has indicated (either in the NLRA or elsewhere) that it did not intend the state action to be prohibited.

Finally, there is another reason that Appellants should be required to produce specific evidence of congressional intent to prohibit states from disqualifying employees whose Section 7 activities in support of a strike against their employer contribute to their own unemployment. And that reason is the labor preemption conundrum which exists at the interface of the NLRA and state labor dispute disqualifications from unemployment compensation (see Section A, *supra*). Where either of the two alternative courses chosen by the states will conflict with some aspect of the NLRA, presumptions of preemption based on that statute make no sense. Indeed, the two alternatives open for the states would create conflicting presumptions, thus nullifying any labor preemption conclusions ordinarily to be drawn from the requirements of the NLRA itself. In these circumstances, we submit, any presumptions of preemption *vel non* must be found in the Social Security Act, where Congress specifically addressed the question of what federal restrictions should be imposed on the states' unemployment compensation systems. There congressional intent is clear—Congress expressly gave the states broad freedom to establish their own eligibility criteria and specifically chose not "to restrict the States' freedom to legislate in th[e] area [of labor dispute disqualifications]." *Hodory*, 431 U.S. at 488-489. Accordingly, the only logical conclusion is to hold that Congress intended the states to choose for themselves whether to disqualify claimants involved in the strikes causing their unemployment, whether that involvement be in the form of the Section 7 right to strike or the Section 7 right financially "to assist" their union in the strike.

CONCLUSION

For the foregoing reasons, General Motors respectfully submits that the judgment of the Michigan Supreme Court should be affirmed and the MESA financing provision upheld.

Respectfully submitted,

J. R. WHEATLEY
GENERAL MOTORS CORPORATION
New Center One Building
3031 West Grand Boulevard
Post Office Box 33122
Detroit, Michigan 48232
(313) 974-1792

JONATHAN N. WAYMAN
FILDEW, HINKS, GILBRIDE,
MILLER & TODD
3600 Penobscot Building
Detroit, Michigan 48226
(313) 961-9700

PETER G. NASH
Counsel of Record
DIXIE L. ATWATER
OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART
1200 New Hampshire Ave., N.W.
Suite 230
Washington, D.C. 20036
(202) 887-0855

Counsel for Appellee
General Motors Corporation

February 7, 1986

REPLY

BRIEF

No. 85-117

In The

Supreme Court of the United States

October Term, 1985

A. G. BAKER, JR., KENNETH COLLIER, and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' REPLY BRIEF

FRED ALTSHULER
Altshuler and Berzon
177 Post Street, Suite 600
San Francisco, CA 94108
(415) 421-7151

JORDAN ROSSEN
Counsel of Record
RICHARD W. MCHUGH
DANIEL W. SHERRICK
8000 E. Jefferson Avenue
Detroit, MI 48214
(313) 926-5216

Counsel for Appellants

APPEAL DOCKETED JULY 22, 1985
JURISDICTION NOTED OCTOBER 15, 1985

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226-2003
(313) 962-8745

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 85-117

In The

Supreme Court of the United States

October Term, 1985

A. G. BAKER, JR., KENNETH COLLIER,
and ROBERT J. SEIDELL,

Appellants,

vs.

GENERAL MOTORS CORPORATION,

Appellee,

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANTS' REPLY BRIEF

PRELIMINARY STATEMENT

Despite serious mischaracterizations of facts and issues, which we explain *infra*, the briefs of General Motors and the United States[1] make clear that there are a number of areas of common ground in this case.

It is common ground that appellants have been denied unemployment compensation solely because they exercised their Section 7 right to pay their union dues (including the increased dues that were required of all UAW members in

[1] Appellee General Motors Corporation will generaly be called "GM." *Amicus Curiæ* United States will usually be called "US." Citations to appendices in the Jurisdictional Statement (1a-159a) and the Joint Appendix (160a-210a) will be preceded by "J.S." and "J.A." Additional sections of the NLRA, the LMRA and the MESA and an unreported Delaware court opinion are included at the end of this brief as pages 211a-227a.

October and November, 1967). Further, neither GM nor the US claim that these dues requirements were unlawful under federal law or improper under the UAW's Constitution (J.S. 153a-154a). Nor is it disputed that these dues were uniformly required as a condition of membership in appellants' union and that nonpayment would therefore be tantamount to resignation from the union. Both GM and the US therefore agree that because the disqualification here was based solely on payment of these lawful dues, "there may, in fact, be said to be at least a facial conflict between Section 7 of the NLRA" and the disqualification at issue here. (GM Br. at 16; US Br. at 11)

It is also agreed that as a "general proposition . . . state laws which conflict with the NLRB are presumptively preempted where Congress has not otherwise legislated." (GM Br. at 34; *see also* US Br. at 13, n. 10)

In addition, both GM and the US acknowledge that there are some limits to the application of state labor dispute statutes and that under some circumstances such provisions impermissibly conflict with NLRA rights and are therefore preempted. Both agree that *Nash* v. *Florida Industrial Commis.*, 389 U.S. 235 (1967) was correctly decided.

Finally, it is common ground that in enacting the NLRA and the Social Security Act (SSA), Congress did not consider — let alone approve — state laws which deny unemployment compensation on the basis of a financial contribution to a striking union.

Notwithstanding the foregoing, GM and the US maintain that the conflict between state law and the NLRA, and the absence of proof that Congress intended to tolerate this conflict, do not warrant preemption here. GM and the US advance four basic grounds to resist such a finding; none can withstand analysis.

Before rebutting the arguments advanced by GM and the US, one crucial point must be made. GM erroneously assumes that appellants ask this Court to strike down Michigan's "financing" provision *per se*, thus invalidating all state financing disqualifications. We do not. The only question posed by this case is whether financing disqualifications may

be *applied*, consistent with federal labor policy, to disqualify individuals *because* those individuals have paid union dues lawfully and uniformly required as a condition of membership in their union.[2]

ARGUMENT

I. NONE OF GM's ARGUMENTS ARE SUFFICIENT TO OVERCOME THE PRESUMPTION OF PREEMPTION WHICH ARISES FROM THE DIRECT CONFLICT PRESENTED HERE BETWEEN MICHIGAN'S RULING AND APPELLANTS' SECTION 7 RIGHTS TO PAY DUES TO, AND REMAIN MEMBERS OF, THEIR CHOSEN COLLECTIVE BARGAINING REPRESENTATIVE.

1. GM's *New York Telephone* Argument: Both GM and the US argue that under *New York Telephone Co.* v. *New York State Dep't. of Labor*, 440 U.S. 519 (1979), financing disqualifications are permissible or, at least, that *New York Telephone* "goes a long way towards disposing of this case." (US Br. at 12; GM Br. at 15) While we agree that *New York Telephone* impliedly "insulate[s] a state's decision to deny benefits to strikers" (US Br. at 14), it does not follow that *New York Telephone* insulates a state's denial of compensation to *non-strikers* solely because those individuals paid increased union dues.[3]

As we show in our opening brief — and as GM and the US acknowledge — the Court in *New York Telephone* upheld a state law granting benefits to strikers (after an eight-week exclusion), based on the congressional awareness and approval of that New York statute and similar laws. (Br. at 22-24) There is *no* comparable legislative history with respect

---

[2] Similarly, in *Nash*, this Court did not construe the preemption claim as a facial attack on Florida's "labor dispute disqualification" but held only that Florida could not *apply* its statute so as to penalize Nash's NLRA rights.

[3] Both GM and the US attempt to blur the distinction between appellants and actual strikers by claiming that appellants' payment of the $20-$40 in increased dues in the fall of 1967 "caused," or "contributed to" their layoff. (*E.g.*, GM Br. at 20, 26; US Br. at 15) As we explain *infra*, Part II, there is no basis for such a claim.

to "financing" disqualifications at all — let alone on the question of union dues payment as a basis for disqualification.[4]

GM and the US make much of the fact that the law upheld in *New York Telephone* denied benefits on the basis of the exercise of a Section 7 right — the right to strike. But the fact that Congress (after being made aware of the striker eligibility issue) decided to permit disqualification of strikers, does *not* mean that Congress also decided to permit benefit denials on the basis of the exercise of all *other* Section 7 rights. Surely the permissibility of a state law denying benefits to one who joined a union (even a union conducting a strike at other plants), or who spoke in support of a strike, is not settled by Congress' decision to permit disqualification of actual strikers.

Indeed, the Section 7 right to strike is qualitatively different from other Section 7 rights. For example, while the right to strike is certainly encompassed by Section 7, the fundamental policies of both the NLRA and the LMRA especially encourage and protect "the practice and procedure of collective bargaining and . . . the exercise by workers of full freedom of association, self-organization and the designation of

---

[4] Both GM and the US stress that the Department of Labor has not disapproved Michigan's labor dispute statute. Because the MESA is *not* being facially challenged, and because the instant case is the *first time* any state court has upheld disqualification based on dues payment alone, the silence of the U.S. Department of Labor does not signal approval of Michigan's ruling here.

See, e.g., General Motors v. *Bowling*, 85 Ill. 2d 539, 426 N.E.2d 1210 (1981). which also involved special increased union dues paid by non-strikers. The Court, in holding that claimants had not "financed" the strike, noted:

> *The* [Illinois] *Department of Labor has long taken the position that paying union dues is not financing a labor dispute.* [at 1212; emphasis supplied]

GM and the US also cite § 3304(a)(5) of FUTA as an example of where Congress took specific action to prevent a state's impeding § 7 rights. Contrary to the suggestion of the US, we rely on § 3304 as a demonstration of general federal policy, and not as a specific ground for preemption here. (Br. at 23-24) In addition, § 3304(a)(5) does not, as appellees urge, limit the areas of federal preemption. *Nash, supra.*

representatives of their own choosing"[5] 29 U.S.C. § 151. (211a-212a) *See also* 29 U.S.C. § 141. (213a)

Moreover, employees exercising the right to strike have traditionally subjected themselves to various forms of economic detriment while employees exercising other Section 7 rights have been zealously protected from economic retaliation of any sort. For example, employers are free to permanently replace economic strikers and need not reinstate replaced strikers offering to return to work. *NLRB* v. *MacKay Radio*, 304 U.S. 333 (1938).[6] In contrast, neither employers nor unions may retaliate — economically or otherwise — against employees exercising Section 7 rights other than the right to strike.[7]

---

[5] The freedom of employee self-organization and collective bargaining are the "two fundamental ideas," which "lie at the core of the national labor policy." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972). Justice Blackmun has also noted that the right of employee self-organization is at "the heart of the Act." *Pattern Makers League of North America* v. *NLRB*, __ U.S. __, 105 S.Ct. 3064, 3077 (1985). And, to paraphrase Justice Blackmum in *Metropolitan Life Ins. Co.* v. *Massachusetts*, __ U.S. __, 105 S.Ct. 2380, 2398 (1985): "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union [by denying them their earned compensation for exercising these Section 7 rights]."

[6] This Court has been careful to distinguish the right to strike from other § 7 rights in another context. While the right to strike is clearly waivable, and indeed will be *impliedly* waived by a collective bargaining agreement which includes an arbitration clause, *Teamsters* v. *Lucas Flour*, 369 U.S. 95 (1962), other § 7 rights are subject to waiver only when the contract language is "clear and unmistakable" in its waiver of the *particular* § 7 right at issue. *Metropolitan Edison* v. *NLRB*, 460 U.S. 693, 708 (1983). Further, § 7's protection of the associational rights of employees vis-à-vis their union are so fundamental to the purposes of the Act that they may not be waived under any circumstances. *NLRB* v. *Magnavox*, 415 U.S. 322 (1974).

[7] Under unemployment law, as well as labor law, strikers are different from non-strikers who exercise other Section 7 rights. Strikers, for example, by collectively and voluntarily refusing to work may be disqualified under traditional "voluntary leaving" provisions. In addition, strikers often cannot demonstrate the typical eligibility criteria of "availability for work," "seeking work," etc. Appellants, in contrast, *did* meet all eligibility requirements, were *involuntarily* laid off, and were neither interested nor participating in a labor dispute of any sort. (Br. at 6-7) Appellants' disqualification, therefore, cuts much harder against the grain of unemployment policy generally than does the traditional and widespread disqualification of actual strikers.

Even when the exercise of other Section 7 rights occurs in conjunction with an economic strike, the employer is prohibited from taking action on the basis of the exercise of those other Section 7 rights. Thus, in *MacKay Radio* the Court held that while the employer was "not bound" to offer reinstatement to strikers, and could "resort[] to any one of a number of methods" to determine which strikers it would reinstate, the employer was not free to refuse reinstatement for selected strikers on the basis of their exercise of other Section 7 rights such as being "active in the union." 304 U.S. at 347.

Here, GM could have permanently replaced the foundry strikers. GM could not, however, punish appellants (who were not participating in any strike) because they retained UAW membership by paying the increased dues. And, while states are sometimes subject to restrictions *not* imposed on private parties,[8] it would be startling to permit state penalties based on conduct which an employer may not penalize. As this Court said in *Nash:*

> We have no doubt that the coercive actions which the Act forbids employers and unions to take against persons making charges are likewise prohibited from being taken by the states. [389 U.S. at 239.]

Thus, while *New York Telephone* clearly holds that *strikers* are not insulated from benefit denials, neither the holding nor the reasoning of that case have anything to say about benefit denials based on the exercise of other Section 7 rights.[9] GM's reliance on *New York Telephone* as controlling precedent is therefore wholly misplaced.

---

[8] *Wisconsin Dep't. of Ind.* v. *Gould*, __ U.S. __, 54 U.S.L.W. 4228 (Feb. 26, 1986).

[9] There is another crucial difference between the question posed here and that posed by *New York Telephone*. By definition, an unemployment compensation system deals with individuals who are out of work. Also, by definition, a striker is a person who has ceased working for his employer. Since the status of being unemployed and the status of being on strike are so closely related, the question of whether a striker should qualify for unemployment benefits is an unavoidable issue in any state's unemployment insurance system, and one which *New York Telephone* held Congress specifically left for the states to determine. The eligibility of *non-strikers* for

(*continued on following page*)

2. GM's Social Security Act Argument: GM argues that because the Social Security Act provides a "broad mandate for states to set their own [unemployment compensation] eligibility criteria . . . states should be presumptively free to act *unless* the SSA or its legislative history clearly shows that Congress meant to exclude that area from permissible state action." (GM Br. at 35)[10] (emphasis in original). GM acknowledges that in so arguing it seeks to have the "otherwise applicable presumption of preemption based on the NLRA . . . reversed." (*Id.* at 26) But GM's argument proves far too much for it would mean that, notwithstanding the NLRA (or any other federal statute), states could deny benefits on any ground that Congress did not specifically consider and disapprove, which is to say on virtually any ground at all. Thus, GM's argument would permit disqualifications based on payment of "regular" dues to a union on

---

(*continued from preceding page*)

unemployment insurance raises issues of a far different order. For these individuals, determining eligibility for benefits does not inevitably entail an inquiry into whether they exercised rights afforded them under § 7 of the NLRA. And, unlike strikers, appellants here have not become unemployed *because of* their exercise of § 7 rights.

[10] Indeed, as we point out in our opening brief, the *only* indication of federal intent on the question of disqualification based on dues payment was the Social Security Board's 1940 recommendation that states *remove entirely* their financing disqualifications because such provisions *"might operate to disqualify an individual not concerned with a dispute solely on the basis of his payment of dues to the union that is conducting the strike."* (Br. at 28) Significantly, this recommendation was made *after* Michigan had developed its "regular union dues" language. The Social Security Board, in addressing the dues question, thus refused to recommend the Michigan model limiting protection to "regular dues" and instead recommended elimination of "financing" disqualifications altogether. In addition, Congress followed this recommendation when it amended the District of Columbia Unemployment Act in 1943 to include the "interested or participating" — but *not* the "financing" — language. (Br. at 29) Thus, even *if* GM's arguments somehow shifted to appellants the burden to show that Congress has disapproved disqualifications based on dues payment, we believe the above evidence — the *only* evidence available on this question — does demonstrate Congressional disapproval.

strike, or even based on membership in such a union. Yet neither GM nor the US suggest that states could go so far.[11]

That GM's argument is fallacious is plainly established by this Court's decision in *Nash*. In holding that Florida was precluded from denying benefits based on an employee's filing unfair labor practice charges with the NLRB, the Court in *Nash* did not purport to find — as GM would apparently require — that "the SSA or its legislative history clearly shows that Congress meant to *exclude* that area from permissible state action." (GM Br. at 35; emphasis in original) Rather, faced with the direct conflict between state unemployment law and important NLRA rights, the Court applied traditional preemption principles and held that Florida's application of state law was preempted.[12]

GM and the US apparently agree that Michigan could not disqualify employees on the basis of their union membership.[13] And yet, these appellants *were* disqualified because of their UAW membership in that non-payment of the dues at issue would be tantamount to resignation, and because their individual dues were held to be "meaningfully connected" to the foundry strikes only when combined with the increased dues paid by all other UAW members. (Opinion of 3 Michigan Justices, J.S. 48a-50a, 73a)[14]

---

[11] The US cites cases in which the NLRB and courts hold that employers and unions may not seek discharge of employees who refuse to pay non-"periodic" special assessments. The rationale of those cases supports appellants. *GM*, and not appellants' union, asks this Court to permit Michigan to punish these individuals (and to reward GM) because these appellants voluntarily paid union dues and because they chose to remain union members. As both the majority and the dissent in *Pattern Makers* makes clear, federal law zealously protects the associational rights of employees via-à-vis their union. 105 S.Ct. at 3068, 3077.

[12] GM attempts to avoid the force of *Nash* by noting that the parties there were not involved in "bargaining." (GM Br. at 23) GM is incorrect. The unfair labor practice charge filed in *Nash* alleged discrimination on the basis of active participation in bargaining and in a strike. In any event, as GM knows, appellants here were found to be neither "interested in" nor "participating" in the foundry bargaining.

[13] *See also Hughes* v. *General Motors Corp., et al.*, Del. Sup. Ct. No. 84A-DE-20) (216a, 218a, 219a)

[14] *Cf. GM* v. *Bowling*, *supra*, where the Court noted that a financing disqualification based on dues payment would burden union affiliation. 426 N.E.2d at 1213.

As in *Nash*, Michigan has applied state law to penalize the exercise of federal rights. And as in *Nash*, the "broad mandate" which states enjoy in the unemployment area does not amount to blanket approval of any conflicting state law which Congress has not specifically considered and disapproved.[15]

3. GM's *Hodory* Argument: Relying on *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977), GM (joined by the US) makes an additional and more limited argument based on the SSA: GM argues that because that Act permits the states to disqualify those not on strike but idled by a strike, it necessarily follows that Congress would have authorized financing disqualification as well. This is a non-sequitur.

The question posed here is not answered by the observation that Congress implicitly approved state laws which disqualify all those non-strikers idled by a strike. For such disqualifications are not based on the exercise of any Section 7 right, and thus do not raise any NLRA preemption issues.[16] And the fact that Congress was prepared to allow all those idled by a strike to be denied benefits does not mean that Congress was prepared to permit a subset of the idled to be denied benefits where the subset is defined solely by the exercise of a Section 7 right.

---

[15] GM's reliance on *Brown* v. *Hotel and Restaurant Employees*, — U.S. —, 104 S.Ct. 3179 (1984) to support its argument here is unfounded. (GM Br. at 37-38) *Brown* involved a state law limiting the Section 7 right of employees to elect particular individuals to union office. There the Landrum-Griffin Act demonstrated explicit Congressional intent to allow limitations on *that very Section 7 right*, and contained an explicit anti-preemption clause. 29 U.S.C. §§ 504(a), 523(a). In addition, the majority in *Brown* relied on specific Congressional approval of a bi-state compact which similarly restricted the Section 7 right involved there despite Congressional testimony that such a rule conflicted with Section 7. *Id.* at 3189-90. The Court emphasized that its holding did *not* extend to allow state restrictions of other Section 7 rights but was premised on the fact that "Congress had . . . distinguished" among Section 7 rights and had "accorded less than absolute protection to the employees' right to choose their union officials." *Id.* at 3190.

In contrast, GM admittedly can point to no indication that Congress has condoned state limitations on the Section 7 right involved here — the right to remain members of a labor organization by paying required dues.

[16] *See* discussion of *Hodory* in our opening brief (p. 18, n. 9).

4. GM's Countervailing *Machinists* Argument: Finally, GM (but not the US) argues for the first time here that the ordinary preemption rules are inapplicable because "the interface of the NLRA and state labor dispute qualifications from unemployment compensation creates a basic conundrum in terms of the labor preemption doctrine." (GM Br. at 16) GM thus asserts: "granting unemployment benefits to strike financers . . . would conflict with the NLRA by altering the balance of bargaining power created by Congress, and it would thus normally be preempted by that federal statute under the '*Machinists* branch' of the labor preemption doctrine." (*Id.* at 15) At the same time, "there may, in fact, be said to be at least a facial conflict between Section 7 of the NLRA and a state statute that denies unemployment compensation to claimants who strike or who 'financially assist' the strike that causes their unemployment." (*Id.* at 16) From this GM concludes that "either course a state chooses may offend *some* basic principle of the NLRA" and "[i]n these circumstances, the Court cannot readily follow its usual and proper route of looking to the NLRA to divine Congress' intent in labor preemption case." (*Id.* at 17)

The *Machinists* [v. *Wisconsin Empl. Rel. Comm.*, 427 U.S. 132 (1976)] doctrine was born of the Court's conclusion that in the labor law field, *in addition* to the need to protect federal rights by preempting state interference with those rights, federal labor policy cannot tolerate some state laws touching on activities which Congress did not affirmatively protect but rather "intended should remain unregulated." *Machinists* thus represents an independent ground for preempting state laws which, although perhaps not directly conflicting with substantive federal rights, have an impermissible tendency to upset the "balance of economic power" envisioned by Congress.

GM attempts to invoke the *Machinists* doctrine here to rebut the presumption of preemption which, as GM concedes, arises because of the direct conflict between Michigan's ruling and appellants' Section 7 rights. But GM's argument is logically insufficient to accomplish this task, for the *Machinists* doctrine says nothing about preemption of state laws which, as here and as in *Nash*, operate as direct penalties on the exercise of substantive federal rights. And

for good reason: where Congress has specifically granted federal protection to categories of conduct, that protection cannot be made to depend on a *Machinists* analysis of "impact" on "bargaining position."[17]

Not only is GM's countervailing *Machinists* argument logically insufficient to overcome the presumption based on a direct conflict, GM's *Machinists* doctrine is itself flawed in three respects: (A) because there is no identifiable "neutral" position for Michigan to take with regard to appellants here, the entire *Machinists* analysis is inapplicable; (B) even if a *Machinists* analysis were probative here, there is no factual or legal basis for the claim that payment of benefits to appellants would have *any* impact on the local foundry strikes; and (C) even if *Machinists* applies at all and even *if* there were factual and legal support for GM's new claim, Congress knew of and intended to permit state laws providing unemployment compensation to persons laid off due to strikes elsewhere.

A. Because a *Machinists* analysis is based on an allegedly impermissible "impact" on "bargaining position," any such analysis must *begin* by identifying the pre-existing or Congressionally-mandated "balance of power" which the state law allegedly upsets. States are then required to remain "neutral" by avoiding direct interference with this Congressionally-mandated "balance." In *Machinists* itself, the Court found that a state prohibition of partial strikes was preempted. There, by directly regulating private conduct, the state law had an obvious and direct "impact" on "bargaining power": it eliminated completely the availability of an economic weapon — the partial strike — which Congress had chosen not to prohibit.

Here, in contrast, the state is acting not as a regulator of private conduct but rather as administrator of a public welfare program. And unlike *Machinists*, where the state could remain "neutral" by staying its regulatory hand, there is no

---

[17] It would have been startling, for example, if the Court in *Nash* had concluded that disqualification of an otherwise eligible employee for filing NLRB charges was not presumptively preempted because payment of benefits there would offend *Machinists* by forcing the employer to subsidize the filing of charges against itself.

obviously "neutral" position for the state to take when the only available options are payment or non-payment of benefits.

The plurality in *New York Telephone* recognized that because state unemployment law "does not involve any attempt by the state to regulate or prohibit private conduct," *Machinists* was "not controlling" and application of a *Machinists* analysis to unemployment law therefore involved "extending the doctrine of unemployment law into a new area." 440 U.S. at 532-533. Although uneasy about extending the *Machinists* analysis to the case before it, the *New York Telephone* Court did so largely on the strength of the District Court's findings that:

> The availability of unemployment compensation is a substantial factor in the worker's decision to remain on strike, and . . . in this case, as in others, it had a measurable impact on the progress of the strike. [440 U.S. at 525-526.] [18]

This Court recently decided another case involving application of traditional preemption principles to non-regulatory state action. In *Wisconsin* v. *Gould, supra*, 54 U.S.L.W. 4228, the Court held that states may not refuse to do business with entities because they repeatedly violate the NLRA. There, the Court found that the state law:

> function[ed] unambiguously as a supplemental sanction for violations of the NLRA [and therefore] conflict[ed] with the Board's comprehensive regulation of industrial relations. [*Id.* at 4229]

What distinguishes *New York Telephone* and *Gould* from the present case — and allows traditional preemption principles to be applied in those cases but precludes application of *Machinists* here — is that the state laws in both *New York Telephone* and *Gould* had a clearly non-neutral impact and therefore "frustrate[d] effective implementation" of the Act. 440 U.S. at 550.

---

[18] Specifically, the District Court found that during the course of the strike "more than $49 million in benefits" were paid *directly* to striking employees and that "a substantial part of the cost" of those benefits was imposed on the employer. 440 U.S. at 523-524.

Even if GM could establish that payment to non-striking appellants here would affect the balance of power, the only other option available here — non-payment — would likewise "affect[] the union's ability to sustain a strike and thereby affect[] the balance of power between parties to a labor dispute." (US Br. at 11) Even accepting GM's claim, therefore, a rule precluding state actions which "tip" the balance of power would make no sense here since any course the state adopts will necessarily do so. Thus, *Machinists* may not be applied to *either* generate or rebut a presumption of preemption in the context of the particular labor disputes at issue here.

B. In the present case, *no* findings have been made below, nor has GM advanced any arguments below, that payment of compensation to the non-striking appellants would impede the NLRA by in *any* way affecting the balance of power at the local foundry strikes. Nor can such a claim succeed.

Appellants were not members of the striking foundry local unions. In addition, neither appellants nor their local unions had any interest in the outcome of the local foundry strikes or any ability to influence the conduct of those strikes.

Two foundry strikes lasted 11 days and one foundry strike lasted 12 days. (J.S. 109a, 110a) The foundry strikers received 2 or 3 days of strike benefits of $4 to $6 a day from the UAW Strike Fund (thus reducing union assets and not GM assets) *after the foundry strikes ended* (J.S. 111a).[19] There is no evidence and no finding that the striking foundry Local Unions or any of their members struck or increased the length of their strikes because of an expectation of strike benefits nor that *any* of appellants' dues even reached the foundry strikers. (J.S. 72a-74a and *See infra*, Part II)

GM's argument that payment of unemployment compensation to these appellants would enrich the strike fund is based on GM's erroneous statement that these appellants were "poised" to receive layoff loans from the union strike fund. GM suggests that if appellants had borrowed money

---

[19] In our opening brief, we inaccurately stated that strike benefits were received "during" the foundry strikes. (Br. at 5)

from the strike fund, later received unemployment compensation and still later repaid their loans, they would have enriched the strike fund by what they had earlier received from the fund. Contrary to GM's assertion, *in October, 1981, it was stipulated by the parties that appellants here "generally did not receive layoff loans."* (Joint Exh. 21, ¶ 8, at p. 226 of 1983 Appendix to Michigan Supreme Court) No court or agency has found that the possibility of some non-striking appellants receiving layoff loans in any way influenced the foundry strikes.[20]

GM's assertion that payment to appellants here would have any impact on the parties' bargaining position is further rebutted by the substantial delays in paying claimants and charging GM's account. Appellants were not ruled eligible until November 21, 1968, nine months *after* the foundry strike had ended. (J.A. 160a-166a) And none of appellants received any compensation until March of 1974, *six years* after the foundry strikes, when two state Circuit Courts held in their favor.[21] (J.A. 186a-198a)

In addition, Michigan's statute (unlike that in New York) does not charge an employer's unemployment insurance account during the pendency of litigation.[22] GM's account therefore has *still* not been charged here, even for those appellants who received compensation in 1974. It strains credibility for GM to argue, and there has been no finding below, that the potential that GM's account will eventually be charged due to GM's layoff of these *non-striking* appellants could impact GM's "bargaining position" at the local foundry strikes.[23]

---

[20] GM argues that ruling for these appellants will allow the UAW to limit its strike fund to strikers! Assuming that result is bad or shocking, the UAW can prevent non-strikers from borrowing from the fund regardless of this Court's decision.

[21] In its brief to this Court, in *Kimbell, Inc.* v. *Employment Sec. Commis. of New Mexico*, 429 U.S. 804 (1976), the US noted that similar delays in paying *strikers* minimized the impact on bargaining position during the strikes involved.

[22] Mich. Comp. Laws Sec. 421.20(a). (214a)

[23] Other courts have rejected arguments similar to GM's because of lack of merit and lack of evidence that the payments prolonged the strikes

(*continued on following page*)

GM for the first time in this litigation now implies that appellants, through their union, were involved in a national strategy to help the foundry strikers. There is no finding to support this.[24] Non-strikers who are laid off because of a labor dispute in which they are "interested or participating" are disqualified *regardless* of "financing."[25]

C. Even *if* there were factual findings to support GM's new argument that payment to non-striking appellants here would have had some "effect" on the economic position of the parties to the local strikes, GM's argument here depends on the additional claim that Congress intended to prohibit this result. GM's argument is untenable.

Because all pre-SSA labor dispute provisions limited disqualification to claimants whose unemployment was "directly due to a labor dispute in active progress *in the establishment* in which he is or was last employed" (Br. at 25-26; emphasis supplied), Congress certainly was aware that involuntarily laid-off claimants from *other establishments* would typically be eligible for compensation.[26]

(*continued from preceding page*)

or had significant impact on the employers. *ITT Lamp Division* v. *Minter*, 435 F.2d 989, 993-994 (1st Cir. 1970), *cert. denied* 402 U.S. 933 (1971); *Unemployment Comp. Board, et al.* v. *Sun Oil Co.*, 338 A.2d 710, 716-718 (Pa. Com. Ct. 1975).

[24] The MESC referee rejected a similar argument because the national agreement was settled. (J.A. 177a) That finding has never been challenged by GM and has been upheld by the Board and the Courts. (J.A. 189a, 196a, 205a; J.S. 81a, 135a)

[25] In determining whether claimants are "interested" in the labor dispute leading to their unemployment, courts carefully distinguish between national strikes and local disputes. *Compare General Motors Corporation* v. *Review Board*, 146 Ind. App. 278, 255 N.E.2d 107 (1970) (strikes over local issues by General Motors locals not sufficiently interrelated) with *Burrell* v. *Ford Motor Co.*, 386 Mich 486, 192 N.W.2d 207 (1971), (claimants were directly interested in the disputes because the Ford national agreement was still open). GM admits that the foundry strikes were purely over local issues. (J.S. at 135a)

[26] The Social Security Board's 1936 model bills are even more explicit in geographically limiting disqualification; they require the "stoppage of work" to occur in the "*factory, establishment, or other premises* at which

(*continued on following page*)

A few states now disqualify claimants from other establishments under certain circumstances. But this does not change the fact that Congress has always been aware that *regardless* of "interest, participation or financing," state laws generally provide benefits to claimants involuntarily laid off from "factories, establishments or other premises" where strikes are not occurring (even where the layoffs are triggered by distant strikes). Thus, GM cannot now argue that the "balance of power" envisioned by Congress precludes states from providing compensation to appellants here who likewise were involuntarily laid off from plants not experiencing labor disputes.

II. MICHIGAN DID NOT FIND OR CONCLUDE THAT APPELLANTS' PAYMENT OF DUES OR THEIR EXERCISE OF OTHER SECTION 7 RIGHTS WAS MEANINGFULLY CONNECTED TO THE FOUNDRY STRIKES, CAUSED OR CONTRIBUTED TO APPELLANTS' LAYOFFS BY GM.

Despite the areas of agreement discussed in our Preliminary Statement, both GM and the US misstate the issues presented to this Court and misstate a number of facts.

The US, in its Question Presented, in the description of its argument and in its brief (p. 11, n. 8), erroneously suggests that the issue here is whether a state may bar payment of unemployment compensation to employees who contributed to an emergency fund specifically established for particular strikes which caused their unemployment. This is inaccurate in two respects: (1.) It is undisputed that no emergency fund was created in 1967 or 1968. Appellants' local unions, after Convention action, lawfully collected dues and sent the emergency or increased part of such dues to the *existing* strike fund of appellants' International Union. (*See, e.g.*, J.A. 173a; J.S. 8a, 102a, 153a, 154a); and (2.) The dues were not

---

(*continued from preceding page*)

[claimant] is or was last employed" before allowing disqualification. Social Security Board, Draft Bills for State Unemployment Compensation of the Pooled Fund and Employer Reserve Account Types (1936), p. 13.

established or requested *for the foundry strikes.*[27] GM argued and the Michigan Court agreed that the dues were requested, not just for the Ford and Caterpillar strikers, but also in case there would be a *national* GM or Chrysler strike. Local labor disputes did not even become apparent to GM until mid-January 1968 and the foundry strikes did not begin until late January 1968. (J.S. 109a, 110a)[28]

Contrary to the above undisputed facts, GM erroneously states that the Michigan Court held that appellants knowingly paid dues to support the "very strikes in sister plants that they realized could put them out of work." (GM Br. at 15) Even if this Court accepts the conclusion of two of the five Board members that *some* GM local strikes were foreseeable and that appellants should have foreseen that some of the increased dues would be paid to some local strikers, the Michigan Court did not hold that appellants could foresee these foundry strikes or that appellants knowingly paid money to support those strikes.[29] (*See* GM Ann. Rept. and J.S. 109a, 110a, 135a) The US suggests that Michigan properly found that there was a "meaningful connection" between the payments of the increased dues by these appellants and the foundry strikers. GM broadens this issue by

---

[27] In other places in its statement, the US acknowledges the prior existence of the strike fund (*See, e.g.*, pp. 2, 4); and the US and GM agree that the foundry strikes began in late January. (*See, e.g.*, US Br. at 4, and GM Br. at 5)

[28] GM's 1967 Annual Report states in part:

> On December 15, General Motors and the United Automobile Workers Union reached agreement on a new three-year national contract.
>
> * * *
>
> *Toward the middle of January, 1968, it became apparent that differences existed at a number of locations.* (J.S. 135a & n. 17, and MESC Referee Exh. 42; emphasis supplied)

[29] The opinion of Justice Ryan concluded "that it was foreseeable that the emergency dues would in fact be used to support local GM strikes." (J.S. 34a, 46a, 47a) This conclusion was based upon evidence that there had been local strikes from 1958 to 1964. There was no evidence that any of such local strikes had previously caused layoffs at appellants' plants. In October, 1967, no one could foretell the number of local strikes or their location. (J.S. 135a)

arguing that Congress intended to allow a state to disqualify claimants whose Section 7 activities in any way "contribute" to their own unemployment. Contrary to their arguments, Michigan did not find or conclude that there was a meaningful connection between appellants' dues and the foundry strikers or that any of appellants' dues reached any of the foundry strikers.[30] In any event, this Court is not bound by the legal approach which would punish these appellants by lumping their dues with those paid by all other UAW members in the United States and Canada in order to conclude that the total increased dues were significant.

[30] Two Board members and three of the six Supreme Court Justices concluded that the total amount of increased dues paid by all UAW members in the United States and Canada (not just GM employees) was a substantial addition to the existing $42,000,000 strike fund. (J.S. 112a, n. 36) Three other Michigan Justices concluded that there was no showing that any of appellants' dues reached the foundry strikers. (J.S. 72a-74a)

CONCLUSION

For the foregoing reasons and those in our initial brief, this Court should reverse the Michigan Supreme Court and hold that appellants may not be denied their unemployment compensation.

Respectfully submitted,

By: FRED ALTSHULER
Altshuler & Berzon
177 Post Street, Suite 600
San Francisco, CA 94108
(415) 421-7151

By: JORDAN ROSSEN
Counsel of Record
RICHARD W. McHUGH
DANIEL W. SHERRICK*
8000 E. Jefferson Ave.
Detroit, MI 48214
(313) 926-5216

Counsel for Appellants

Dated: March 21, 1986

* Substantial work on this brief was done by Rosemary Chase and Joseph Slater, students at the Detroit College of Law and the University of Michigan Law School, as supervised by Appellants' counsel. Appellants' counsel also acknowledges extraordinary work by legal secretaries Dolores Gray and Julie Rand.

SUPPLEMENTAL APPENDIX

• • •

ADDITIONAL STATUTORY PROVISIONS

The preamble to the National Labor Relations Act, 29 USC Section 151, provides:

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that the protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

The preamble to the Labor Management Relations Act, 29 USC Section 141, provides:

§ 141. Short title; Congressional declaration of purpose and policy

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of comemerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

June 23, 1947, c. 120, § 1, 61 Stat. 136.

Section 20a of the Michigan Employment Security Act, Mich. Comp. Laws Section 421.20a, provides:

§ 20a. Benefits paid on or prior to June 30 of any year, under a determination, redetermination or decision which is the subject of timely protest or appeal under this act, on which final disposition has not been made by August 31 of such year, shall be charged to a suspense account within the fund as of the immediately preceding June 30 and credits issued to the appropriate employer's account as of that date. As of the date of final disposition of the protest or appeal, such benefit payments shall be transferred from the suspense account as a charge to the appropriate employer's rating account if the final disposition allows benefits, or otherwise to the solvency account as benefit overpayments.

P.A.1936, Ex.Sess., No. 1, § 20a, added by P.A.1971, No. 231, § 1, Imd. Eff. Jan. 3, 1972.

LETTER OPINION
DENYING MOTION OF APPELLEE
GENERAL MOTORS CORPORATION
FOR RECONSIDERATION AND REARGUMENT

(State of Delaware — Superior Court — County of Newcastle)

(Dated February 4, 1986)

(GERARD T. HUGHES, Claimant-Appellant, v. GENERAL MOTORS CORPORATION and UNEMPLOYMENT INSURANCE APPEAL BOARD OF THE DEPARTMENT OF LABOR OF THE STATE OF DELAWARE, Appellees — Civil Action No. 84-DE-20)

SUPERIOR COURT OF THE STATE OF DELAWARE
COURT HOUSE WILMINGTON, DE. 19801
VINCENT J. POPPITI, *JUDGE*

February 4, 1986

[*Addresses Omitted*]

Letter Opinion
Civil Action No. 84A-DE-20

RE: Gerard T. Hughes v. General Motors Corporation and Unemployment Insurance Appeal Board of the Department of Labor of the State of Delaware

Gentlemen:

The matter is presently before the Court on the application of General Motors Corporation to reconsider my order of November 4, 1985.

In this regard, I have read and considered the Motion of Appellee General Motors Corporation for Reconsideration and Reargument filed on November 12, 1985 and Appellant's Response to Appellee's Motion for Reconsideration and Reargument received on November 19, 1985.

I am satisfied that nothing presented in behalf of the General Motors Corporation should result in a reversal of what I see as a pure question of law.

In arriving at this conclusion, I should state that the holding of *Fretz* v. *Unemployment Insurance Appeal Board*, Del.Super., C.A. No. 83A-MY-2, Bush, J., (Feb. 1, 1984) is inapposite to this case. Therein Judge Bush addressed an issue similar to the issue in the case *sub judice* with one important difference, namely the claimants were full members of the striking union. In the instant case, I have recognized and given legal effect to the difference between full membership and something less than that.

Having stated the above, the application of the General Motors Corporation is HEREBY DENIED.

IT IS SO ORDERED.

Yours very truly,
/s/ Vincent J. Poppiti
Judge

MOTION OF APPELLEE GENERAL MOTORS CORPORATION FOR RECONSIDERATION AND REARGUMENT

(State of Delaware — Superior Court — County of Newcastle)

(Dated November 12, 1985)

(GERARD T. HUGHES, Claimant-Appellant, v. GENERAL MOTORS CORPORATION and UNEMPLOYMENT INSURANCE APPEAL BOARD OF THE DEPARTMENT OF LABOR OF THE STATE OF DELAWARE, Appellees — Civil Action No. 84-DE-20)

Pursuant to Superior Court Civil Rule 59(e), Appellee General Motors Corporation ("GM") moves this Court for reconsideration of its Order of November 4, 1985 in the captioned matter (the "Order") reversing and remanding the decision of the Unemployment Insurance Appeal Board (the "Board") with direction to find for Appellant Gerard T. Hughes ("Hughes"). In support of its motion for reconsideration, GM states as follows:

1. In Paragraph 11 of the Order, the Court stated that it was GM's position that Hughes was a full member of United Automobile Workers ("UAW") during a strike at GM's Wilmington Plant. This is not GM's position. Rather, GM is simply asserting that Hughes, by virtue of the union security provisions set forth in paragraphs 4 and 4(a) of the National Agreement and his payment of dues, is still sufficiently affiliated with the UAW to disqualify him from receipt of unemployment compensation benefits under 19 *Del.C.* § 3315(4).

2. GM agrees that *full* membership is prohibited by the National Labor Relations Act ("NLRA"). However, the U.S. Supreme Court's decision in *Pattern Makers' League*

of North America v *NLRB*, 53 U.S.L.W. 4298 (June 27, 1985), cited by the Court, recognizes that membership to the extent of the payment of dues may be required by agreement between an employer and a union. 53 U.S. L.W. at 4231. The National Agreement so provides.

3. The rationale for allowing employers and unions to place "union security" provisions in collective bargaining agreements is to prevent "free riders" from enjoying the benefits of a union's negotiating efforts without assuming a corresponding portion of the union's financial burden. *Radio Officers' Union* v. *NLRB*, 347 U.S. 17 (1964); *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963). This same rationale is applicable to the facts at hand and should disqualify Hughes from receipt of unemployment compensation benefits. However, under the Order, Hughes will be able to enjoy the benefits of the UAW's negotiating efforts, in the form of a new National Agreement with an increase in wages and benefits, without assuming the same financial burden as other UAW members who were disqualified from receipt of benefits.

4. Even if the Court correctly found that Hughes' status was not sufficient to disqualify him from receipt of unemployment compensation benefits under 19 *Del.C.* § 3315(4), the NLRA preempts Section 3315(4) to the extent that it can be construed to permit such payments. In *United Steel Workers of America* v. *Meirhenry*, 608 F. Supp. 201 (D.S.D. 1985), the court permanently enjoined the South Dakota Department of Labor from enforcing a state statute which had been construed to permit payment of unemployment compensation benefits to non-union employees idled by a strike while union members were denied such benefits. It held that such payments would be "inherently destructive" of the rights guaranteed by the NLRA. As that court stated:

> [T]he court has no hesitation finding in that the "allurements" or "inducements" offered . . . in the state unemployment compensation law create a visible continuing obstacle to the future exercise of the employee right, guaranteed under 29 U.S.C. § 157, to decide whether to belong to a union, and have far reaching effects that would hinder future union bargaining and discriminate solely upon the basis of participation in strikes or union activity. Thus, the South Dakota statute is "inherently destructive", and in direct conflict with, the right to unionize under 29 U.S.C. § 157; to allow the state unemployment compensation policy to stand would frustrate the purposes of the NLRA. Accordingly, the court must hold that the South Dakota statute is preempted by 29 U.S.C. § 157.

608 F.Supp. at 208-09. (Citations omitted).

5. The Order provides a tremendous incentive for employees to resign from their union either during or prior to a strike. Apparently, they would then become eligible for unemployment benefits. As a result, the Court's interpretation of Section 3315(4) is "inherently destructive" of the NLRA and should be reconsidered.

6. In Paragraph 14 of the Order, the Court ruled that Claimant's request for work was sufficient to repudiate the strike and avoid the disqualification set forth in Section 3315(4). However, the mere offer of work is not sufficient to avoid disqualification under this Section. In *Fretz* v. *Unemployment Insurance Appeal Board*, Del.Super., C.A. No. 83A-MY2, Bush, J. (a copy of this decision is attached hereto as Exhibit A), this Court held that members of a union who were idled because their employer engaged in a "lockout" were still disqualified from

receipt of unemployment compensation benefits even though they were ready, willing, and able to work.

7. GM respectfully requests the opportunity for oral argument on this motion.

/s/ William W. Bowser
Richards, Layton & Finger
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
Attorneys for Appellee
General Motors Corporation

DATED: November 12, 1985

[*Certificate of Service Omitted*]

ORDER

(State of Delaware — Superior Court — County of Newcastle)

(Filed November 5, 1985)

(GERARD T. HUGHES, Claimant-Appellant, v. GENERAL MOTORS CORPORATION and UNEMPLOYMENT INSURANCE APPEAL BOARD OF THE DEPARTMENT OF LABOR OF THE STATE OF DELAWARE, Appellees — Civil Action No. 84-DE-20)

Submitted: July 30, 1985
Decided: November 4, 1985

Gerard T. Hughes, Pro Se, of
1543 Porter Road, Wilmington, Claimant-Appellant.
William W. Bowser, Esquire, of
Richards, Layton and Finger, Wilmington for Appellees.

ORDER

Appeal from the Unemployment Insurance Appeal Board
— Reversed and Remanded —

This 4th day of November, 1985:

Upon consideration of the record before the Unemployment Insurance Appeal Board ("hereinafter the Board") and the contentions of the parties contained in the submitted briefs, it appears to the Court that:

(1) This is an appeal from a decision of the Board denying the claim of Gerard T. Hughes ("the claimant") for unemployment compensation benefits. In this regard a claims deputy disallowed his claim stating in part that: "his unemployment is due to a stoppage of work which exists because of a labor dispute, and the claimant is a member of an organization which is participating in, or

directly interested in, the labor dispute which caused the stoppage of work."

(2) Subsequent to a hearing on October 22, 1984, the Referee affirmed the decision of the claims deputy ruling that the claimant was disqualified from benefits pursuant to 19 *Del.C.* § 3315(4) which states that the individual is disqualified for benefits:

> For any week with respect to which the Department finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed.

(3) After a hearing on December 12, 1984, the Board adopting the findings of fact of the Referee, affirmed the Referee's decision.

(4) For reasons articulated hereinafter, I am satisfied that the Board's conclusion denying the claimant's benefits is incorrect as a matter of law and must, therefore, be reversed and remanded for entry of an order consistent herewith.

(5) In this regard, the following facts of record are uncontroverted. The claimant has been an employee of General Motors, Inc., (hereinafter "G.M.") at its facility in Wilmington, Delaware since October 21, 1965. The United Automobile Workers (hereinafter the "UAW") represented the claimant pursuant to the Collective Bargaining Agreement between G.M. & the UAW. Relevant language of the National Agreement containing union security language reads in pertinent part as follows:

> (4) An employee who is a member of the Union at the time this Agreement becomes effective

> shall continue membership in the Union for the duration of this Agreement to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or obtaining membership in the Union.
>
> (4a) An employee who is not a member of the Union at the time this agreement becomes effective shall become a member of the Union within ten (10) days after the thirtieth (30th) day following employment, whichever is later, and shall remain a member of the Union, to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union, whenever employed under, and for the duration of, this Agreement.

Additionally the National Agreement contains a dues and fees check off provisions which reads as follows:

> (4h) During the life of this Agreement, the Corporation agrees to deduct from the pay of each employee, or notify the Trustee of the GM-UAW Supplemental Unemployment Benefit Plan Fund to deduct from each such employee's Regular Benefits, Union membership dues levied by the International Union or Local Union in accordance with the Constitution and By-Laws of the Union, provided that each such employee executes or has executed the following "Authorization for Check-Off of Dues" form; provided further however, that the Corporation will continue to deduct monthly membership dues from the pay of each employee for

whom it has on file an unrevoked Authorization for Check-Off of Dues form.

(6) Approximately one and one half years prior to the period of time for benefits in question, the claimant met with representatives of G.M. and UAW in order to effect his resignation from the union. He was at that time informed that the union security provisions as set forth herein would preclude his resignation if he desired continued employment with G.M. He, therefore, did not resign at that time. After receiving guidance from the National Right to Work Legal Defense Foundation, Inc., the claimant on or about August 31, 1984 sent a letter to the UAW and G.M. terminating his active membership in the UAW. By correspondence dated November 14, 1984, Local 435 responded to the claimant stating in pertinent part as follows:

* * *

"The Collective Bargaining Agreement contains a Union security clause . . .

Your compliance with this provision is required. However, as the text of the . . . contract provides the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. It is permissible to condition employment upon membership, but membership insofar as it has any significance to your employment rights, may and will in turn be conditioned only upon your payment of fees and dues.

No other requirement will be imposed upon you pursuant to the Agreement, and will not seek to affect your employment status in any way

so long as you continue to tender dues as provided in the Agreement."

* * *

(7) Subsequent to the claimant's referenced letter, the record reflects that he has continued to pay dues and fees to the union.

(8) On September 24, 1984, the National Agreement expired and a strike was called. As a result of the strike, the approximately 4,000 UAW members employed at the plant in question refused to work and the assembly line was completely shut down. The only UAW members to work by agreement between UAW and G.M. were several skilled tradesmen to run the powerhouse and handle any emergencies that might occur.

(9) Claimant who did not actively participate in strike activities and who did not accept any strike benefits requested to work during the period, but G.M. refused his request. In fact no assembly work occurred during the course of the strike.

(10) The following week a new National Agreement was reached, the strike ended, and the claimant returned to work at increased wages and benefits resulting from the new National Agreement.

(11) A threshold question centers around G.M.'s contention that claimant was still a full member of the union at the time of the work stoppage and as a result thereof was a participant in the work stoppage. *See Chrysler Corp.* v. *Unemployment Insurance* App. B. of D. of L., Del.Supr., 345 A.2d 418 (1975). I disagree with G.M.'s position in this regard.

(12) I am satisfied that by virtue of the claimant's action to seek termination of his membership from the UAW he changed his status from full membership to something

less than that. To suggest that G.M. *vis a vis* the union security agreement could require more as a condition of continued employment would be a clear violation of the Taft-Hartley Act. The United States Supreme Court in the recent case of *Pattern Makers' League of North America* v. *N.L.R.B.*, 53 U.S.L.W. 4928, 4931 (June 27, 1985) stated as follows,

> Section 8(a)(3) of that Act effectively eliminated compulsory union membership by outlawing the closed shop. The union security agreements permitted by § 8(a)(3) require employees to pay dues, but an employee cannot be discharged for failing to abide by union rules on policies with which he disagrees. . . .
>
> Under § 8(a)(3) the only aspect of union membership that can be required pursuant to a union ship agreement is the payment of dues. . . . Therefore, an employee required by a union security agreement to assume financial 'Membership' is not subject to union discipline. Such employee is a 'member' of the union only in the most limited sense. . . . By allowing employees to resign from a union at any time, § 8(a)(3) protects the employee whose views come to diverge from those of his union.

(13) In the instant case, therefore, where the facts are undisputed and the sole question on appeal concerns the application of 19 *Del.C.* § 3315(4) to the claimant's status, the Court must determine whether the Board made a mistake of law in denying benefits. *See Delgado* v. *Unemployment Ins. Appeal Bd.*, Del.Super., 295 A.2d 585, 586 (1972).

(14) In the case of *Chrysler Corp. supra*, the Delaware Supreme Court adopted the Kentucky and California so

called "volitional test" involving personal responsibility. *Chrysler Corp. supra* at 421-422. In this case the record is completely devoid of any act on the part of the claimant in furtherance of the work stoppage. Similarly the record is completely devoid of any evidence that the claimant sought or was paid any UAW strike related benefits. Indeed, I am satisfied that by virtue of his request for work, notwithstanding the UAW directed work stoppage he repudiated the action of the UAW in this regard and is, therefore, "free of fault because of non-participation in the labor dispute" *Chrysler Corp. supra*, at 422 and *see Pacific Maritime Association* v. *California Unemployment Insurance Appeal Board* et al., Cal.App., No. A02751 & A019154 (June 24, 1985).

(15) I am convinced that to rule otherwise would result in frustrating the provisions of the Taft-Hartly [*sic*] Act prohibiting forced union membership and would in this case emasculate the mobility of the volitional test.

For reasons articulated herein, the decision of the Board is, therefore, REVERSED AND REMANDED with direction to find for the claimant.

IT IS SO ORDERED.

/s/ Vincent J. Poppiti,
Judge

AMICUS CURIAE

BRIEF

No. 85-117

In the Supreme Court of the United States

OCTOBER TERM, 1985

A.G. BAKER, JR., ET AL., APPELLANTS

v.

GENERAL MOTORS CORPORATION AND MICHIGAN EMPLOYMENT SECURITY COMMISSION

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

CHARLES FRIED
Solicitor General

CAROLYN B. KUHL
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether a state statute that bars the payment of unemployment compensation to employees who, by contributing to an emergency fund specifically established for a labor dispute, financed the labor dispute that caused their unemployment, impermissibly conflicts with the right of employees under Section 7, 29 U.S.C. 157, of the National Labor Relations Act "to form, join, or assist labor organizations."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution and statutes:

Constitution and statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-117

A.G. BAKER, JR., ET AL., APPELLANTS

v.

GENERAL MOTORS CORPORATION AND MICHIGAN EMPLOYMENT SECURITY COMMISSION

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE

INTEREST OF THE UNITED STATES

The question presented in this case is whether the Michigan statute (Mich. Comp. Laws Ann. § 421.29(8)(a)(ii) (West 1978)) that disqualifies employees from receiving unemployment benefits if they are "participating in or financing or directly interested in" a labor dispute that causes their unemployment impermissibly interferes with the federal labor policy embodied in the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449, 29 U.S.C. 151 *et seq.*

Since the proper resolution of this question turns on the intent of Congress in enacting two major statutory programs that are administered by federal agencies—the NLRA and Title IX of the Social Security Act of 1935, ch. 531, 49 Stat. 639 (amended and recodified as the Federal Unemployment Tax Act, ch. 736, 68A Stat. 439, 26 U.S.C. (& Supp. I) 3301 *et seq.*)—the United States has a substantial interest in this case. In earlier cases involving challenges under the federal labor laws to state

unemployment compensation statutes, the United States has filed amicus curiae briefs in this Court. *E.g.*, *New York Telephone Co.* v. *New York State Dep't of Labor*, 440 U.S. 519 (1979); *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967).

STATEMENT

1. This case is an outgrowth of collective bargaining negotiations in the automotive industry almost 20 years ago. In September 1967 the national and local collective bargaining agreements between the United Auto Workers (UAW) and the three major auto makers expired. UAW members employed by General Motors (GM) voted to authorize strikes against GM on national and local issues. J.S. App. 100a-101a. At the time of the strike authorization votes UAW members paid monthly dues of $5.00, of which $3.75 was designated by the union as "administrative" dues and $1.25 was designated as "[s]trike [f]und [i]nsurance" dues (*id.* at 103a).

When the collective bargaining agreements expired, UAW members went on strike against Ford, the company selected as the initial target; there were no immediate strikes at GM plants. While the nationwide strike proceeded against Ford,[1] a special UAW convention amended the international union's constitution to provide for "[e]mergency [d]ues" (J.S. App. 101a). The new dues were effective immediately and were to continue " 'during the current collective bargaining emergency as determined by the International Executive Board and thereafter, if necessary' " (*id.* at 102a). The new dues structure left the amount of dministrative dues unchanged but increased each members' monthly contribution to the strike insurance fund from $1.25 to either $11.25 or $21.25, depending on the average hourly wage at the member's plant. The amendment provided that after the emergency ended monthly dues would consist of two hours " 'straight

[1] Some three weeks after the Ford strike commenced, the UAW also went on strike against the Caterpillar Company. J.S. App. 101a.

time' " pay, or roughly six dollars, with 40% earmarked for the member's local union and the remainder allocated equally between the international's administrative and strike insurance funds. *Id.* at 101a-102a.

The UAW constitution committee explained at the convention that a " 'temporary emergency dues increase' " was needed to "support the Ford and Caterpillar workers in their strike and to assure strike benefits to members who may be involved in other strikes in the course of the critical weeks and months ahead" (J.S. App. 104a). In addition, statements at the convention and in contemporaneous UAW publications asserted that the strike fund required augmentation " '[i]n the event we have a strike at General Motors' " (*id.* at 105a-106a). Each UAW member employed by GM was sent a letter stating that "[t]hese emergency extra dues are being raised to protect GM workers as well as support the Ford strikers" and reminding that national and local strikes against GM three years earlier had cost the strike fund millions of dollars (*id.* at 106a). A UAW official told the constitutional convention that a GM strike would cost the union more than $50 million each month (*id.* at 107a).

As it happened, the strikes against Ford and Caterpillar ended in October 1967—before any emergency dues were collected from UAW members. As negotiations continued with GM, however, emergency dues of $42 million were collected from all UAW members for the months of October and November, thus doubling the strike fund. On November 30, 1967, the UAW determined that there would be no national strike against GM in December and waived collection of the new dues for December 1967 and January 1968. Nevertheless, UAW members were advised that, because " 'the collective bargaining emergency is not yet ended,' " the dues program temporarily would revert to the $5.00 per month in effect prior to the constitutional amendment and not to the amendment's permanent dues program of two hours' pay. GM and the UAW reached agreement on all national issues in December 1967 and a new national agreement took effect on January 1, 1968. J.S. App. 8a-9a, 81a, 112a & n.34, 118a.

Local bargaining issues at a number of GM plants remained unresolved following ratification of the national agreement, and in January and February 1968 UAW members at three GM foundry plants in Michigan, Ohio and New York went on strike over local issues. In accordance with UAW regulations, the international union paid strike benefits totaling approximately $247,000 to the strikers at these plants from the strike insurance fund into which the emergency dues collected in October and November 1967 had been deposited. By curtailing output at the foundries, these local strikes had a ripple effect on GM's production elsewhere: work shortages developed at 24 other GM plants in Michigan and more than 19,000 employees, including appellants, were laid off. J.S. App. 9a, 81a-82a, 114a.

2. Appellants filed claims for unemployment benefits during their layoffs. The Michigan Employment Security Act (MESA), Mich. Comp. Laws Ann. §§ 421.1 *et seq.* (West 1978 & Supp. 1985), disqualifies individuals from receiving benefits in certain cases where their unemployment is the result of a labor dispute. Section 29(8)(a)(ii) of MESA provides in pertinent part (J.S. App. 3a-4a):

> (8) * * * An individual shall be disqualified for benefits for any week with respect to which his total or partial unemployment is due to a labor dispute in active progress * * * in the establishment in which he is or was last employed, or to a labor dispute, other than a lockout, in active progress * * * in any other establishment within the United States which is functionally integrated with the establishment and is operated by the same employing unit * * *. An individual shall not be disqualified under this subsection if he is not directly involved in the dispute.
>
> (a) * * * For the purposes of this subsection an individual shall not be deemed to be directly involved in a labor dispute unless it is established that:
>
> * * * * *
>
> (ii) He is participating in or financing or directly interested in the labor dispute which causes his total or partial unemployment. The payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing a labor dispute within the meaning of this subparagraph.

After several stages of administrative proceedings the Michigan Employment Security Appeal Board held that appellants were disqualified from receiving unemployment benefits because, although they did not "participate" and were not "directly interested" in the local labor disputes that caused their unemployment, they had "financed" the foundry strikes within the meaning of the statute by paying emergency dues into the international strike insurance fund from which benefits had been paid to the strikers. In so finding, the state board concluded that the emergency contributions to the union's strike fund in October and November 1967 were not "regular union dues" within the meaning of the statute because they were not " 'in amounts and for purposes established prior to the inception of [the] labor disputes.' " J.S. App. 82a-83a.

Following further appeals through the state court system,[2] the Michigan Supreme Court agreed that "[t]he emergency dues provided by the amendment constituted a marked deviation from the regular pattern of dues collection * * * whose obvious purpose was to replenish the union strike fund[,]" and that they "could not properly be termed 'regular' " within the meaning of the statute. The court concluded that "the Legislature chose the term 'regular' to exclude from possible treatment as financing those dues payments required uniformly of union members and collected on a continuing basis without fluctuations prompted by the exigencies of a particular labor dispute or disputes."[3] Having determined that the emer-

---

[2] The decision of the Michigan Court of Appeals upholding the state board's determination is reproduced at J.A. 201a-210a.

[3] In so finding, the court rejected appellants' contention that the term "regular union dues" in the Michigan statute should be construed as the equivalent of " 'periodic dues * * * uniformly required as a condition of [union] * * * membership' " under the union secu-

gency dues payments at issue were not "regular," the court found it unnecessary to determine whether the dues had been established prior to the labor disputes that caused appellants' unemployment. The court concluded, however, that "[w]hile the statute does not require that payments made by individuals * * * be traced into the hands of workers involved in the labor dispute which caused the individuals' unemployment," the payment of such non-regular dues could not be found to be "financing" within the meaning of the statute unless there was a "meaningful connection" between the payments and the labor disputes that resulted in claimants' unemployment. The court remanded the case to enable the state board to make such a determination. J.S. App. 93a-95a.

3. On remand, the Michigan Employment Security Board of Review,[4] in a plurality decision, concluded that the purpose, amount, and timing of the emergency dues payments revealed a meaningful connection between the payments and the labor disputes that caused claimants' unemployment. Accordingly, the board found that the payments constituted "financing" within the meaning of the statutory disqualification (J.S. App. 99a-142a).

Relying on the statements made at the UAW convention and in publications and letters to members, the plu-

---

rity proviso to Section 8(a)(3) of the NLRA, 29 U.S.C. 158(a)(3). Appellants asserted that this would include all "dues * * * so long as they are part of the union's constitutionally adopted dues structure rather than separately imposed special assessments." In support of that argument appellants relied on a decision by the General Counsel of the National Labor Relations Board. In refusing to issue an unfair labor practice complaint against the UAW based on the emergency dues increase at issue here, the General Counsel concluded that the dues were "a permissible change in 'periodic dues'" under the proviso to Section 8(a)(3), payment of which the union could lawfully compel as a condition of membership under a union security clause. J.S. App. 144a-146a, 91a & n.25. The court found "no evidence of a legislative intention to equate 'regular union dues' with 'period dues' enforceable through a union security agreement under § 8(a)(3) of the NLRA" (*id.* at 93a).

[4] The board of review is the successor to the appeal board (J.S. App. 11a n.7).

rality found (J.S. App. 124a) that "the emergency dues were intended to fund local labor disputes at GM facilities." Because it was foreseeable that local strikes in the functionally integrated auto industry could cause layoffs elsewhere, claimants necessarily "anticipated strikes which might affect themselves" and "were not mere victims of circumstance" (*id.* at 119a, 124a). In addition, the plurality found that the emergency dues were a substantial source of funding for the local strikers (*id.* at 111a-115a, 124a-125a). Finally, the board's plurality concluded (*id.* at 125a) that "the payment of emergency dues, as late as January, 1968 was sufficiently proximate with strike benefits paid in late January or early February, 1968." "The build-up of a strike fund prior to a strike action is a typical strategy" and, therefore, to "require that the period of the strike and the collection of emergency dues overlap is too rigid a reading of the 'is . . . financing' language of the statute" (*ibid.*).[5]

4. The Michigan Supreme Court upheld the denial of benefits (J.S. App. 6a-74a), holding that a "meaningful connection exists where, for the purpose of supporting labor disputes foreseeably encompassing the labor dispute that caused the claimant's unemployment, the claimant engages in financing labor disputes in significant amounts

---

[5] A concurring board member found that a meaningful connection existed between the emergency dues and strike benefit payments based on the "commonalities of interest and shared objectives between those workers on strike and the workers who bec[a]me unemployed due to a labor dispute" (J.S. App. 127a). In the concurring member's view, the local disputes that followed the national GM agreement were, practically speaking and as a matter of bargaining history in the auto industry, simply part and parcel of a single collective bargaining emergency that was precipitated by the termination of the earlier contracts and that affected all UAW and GM employees equally.

Two board members dissented because in their view the payments of emergency dues occurred before the local labor disputes arose and were intended only to finance national strikes, and because the actual strike benefit payments that "might conceivably be attributable to the claimants in this case are indirect and *de minimus*" (J.S. App. 133a-139a, 139a-142a).

and at times proximately related to the labor dispute which caused the claimant's unemployment" (*id.* at 26a, 32a-33a).

The court rejected appellants' contention that the State's construction of its "financing" disqualification provision is preempted by the NLRA because it impermissibly conflicts with the Section 7 right of employees to "assist labor organizations." The court found at the outset that Section 7 of the Act "protects the right of employees to *financially* 'assist' their unions" and that "the MESA disqualification does affect the exercise of the right to 'assist' guaranteed in the NLRA" (J.S. App. 61a-62a) (emphasis in original). In light of this tension between the state and federal statutes the court, citing *New York Telephone Co.* v. *New York Dep't of Labor*, 440 U.S. 519 (1979), concluded (Pet. App. 63a) that "the burden is upon the [state] to show that Congress intended to tolerate the conflict caused by the challenged state law [and] is not upon the plaintiff to show that Congress intended to prohibit the conflict." Its review of the legislative history of the Social Security Act and the NLRA persuaded the court that Congress had in fact "intended to tolerate" the state law provision at issue (*id.* at 69a).[6]

SUMMARY OF ARGUMENT

This case directs the Court's attention once again to the particular federal preemption issues that arise when a state unemployment compensation plan, implemented under the Social Security Act and the Federal Unemployment Tax Act, is alleged to conflict with federal labor law. As in any preemption case, the "ultimate touchstone" is congressional intent. *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 5, 1984), slip op. 22. But, unlike more routine labor preemption cases, the question is not simply whether the state has acted in a way that is inconsistent with the comprehensive federal scheme for governing the major aspects of labor-management relations within its scope. See, *e.g.*, *Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485 (1953); see generally *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Rather, this case arises in the unusual context where Congress has itself provided a gloss on the NLRA. Because of the historic confluence between that statute and the Social Security Act (both were considered and enacted almost simultaneously), the full measure of Congress's intent to tolerate a range of actions by the states cannot be ascertained without taking into account both statutory regimes. See *New York Telephone*, 440 U.S. at 539 n.32 (plurality opinion).

[6] By the same reasoning, the court rejected appellants' contention that the Michigan statute impermissibly interferes with the internal affairs of labor unions by affecting the nature and timing of dues increases (J.S. App. 69a). The court also rejected a claim that the statute violated appellants' First Amendment right of freedom of association (J.S. App. 69a-72a).

In *New York Telephone*, 440 U.S. at 544, this Court concluded that "Congress intended that the States be free to authorize, or to prohibit, [the] payments" of unemployment compensation to strikers even though the balance of economic power between labor and management would be affected. This case is not a carbon copy of *New York Telephone*. Because Michigan has *denied* unemployment compensation, rather than authorized it (as in *New York Telephone*), appellants contend that the state is not merely affecting the balance of power but is impermissibly interfering with employee rights protected by Section 7 of the NLRA. Also, because appellants were disqualified from receiving benefits, not because they themselves struck, but because they "financed" the labor dispute that caused their unemployment, this is not a situation where a striker seeks assistance from the state. Despite these distinguishing characteristics, however, *New York Telephone* provides clear guidance.

The interplay of the NLRA and the Social Security Act and their respective legislative histories demonstrates Congress's commitment to allow the states freedom to act "'without dictation from Washington'" (440 U.S. at 543). Congress chose this course while recognizing that benefits could be denied to striking employees and to

others whose unemployment was caused by a labor dispute in which they were involved. This legislative awareness, coupled with the consistent pattern of federal administrative approval of Michigan's benefits plan, provides persuasive evidence that the judgment below does not exceed the latitude Congress afforded to the states in this complex area of social policy.

ARGUMENT

THE MICHIGAN STATUTE DISQUALIFYING FROM UNEMPLOYMENT COMPENSATION EMPLOYEES WHO FINANCED THE LABOR DISPUTE THAT CAUSED THEIR UNEMPLOYMENT BY CONTRIBUTING TO AN EMERGENCY FUND SPECIFICALLY ESTABLISHED FOR THAT DISPUTE DOES NOT IMPERMISSIBLY BURDEN THE RIGHT OF EMPLOYEES UNDER SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT TO "FORM, JOIN OR ASSIST LABOR ORGANIZATIONS"

A. The State Supreme Court's Decision Is Consistent With This Court's Decision In *New York Telephone*

All states (except New York) disqualify persons from receiving unemployment compensation in specified circumstances where a labor dispute with the employer has caused the loss of employment. Michigan, like a number of other states, disqualifies persons unemployed due to labor disputes not only at their own plant, but also "in any other establishment * * * which is functionally integrated with the[ir] establishment and is operated by the[ir employer]" (Mich. Comp. Laws Ann. § 421.29(8) (West 1978)). Like the majority of states, Michigan limits its labor dispute disqualification to those employees who are "directly involved" in the dispute that causes their unemployment, that is, persons who are "participating in or financing or directly interested" in the dispute (*id.* § 421.29(8)(a)(ii)). In four states, including Michigan, the disqualification does not preclude persons from receiving benefits simply because they are dues-paying members of a union. Thus, the Michigan statute expressly

provides that the "[t]he payment of regular union dues, in amounts and for purposes established before the inception of the labor dispute, shall not be construed as financing" (*ibid.*),[7] and as the court found, the financial payments must be "meaningfully connected" (J.S. App. 95a) to the labor dispute before they may serve as a basis for denying benefits.[8]

Pursuant to these provisions, Michigan disqualified GM employees who contributed substantial sums (roughly 10 to 15 times the amount of their normal strike insurance) to an emergency strike fund. It was, as the state court concluded, foreseeable that the contributions could support strikes against the company and cause appellants' unemployment. The resulting strikes had precisely that effect. In these circumstances the Michigan Supreme Court found (J.S. App. 62a) that the State's financing disqualification affects the exercise of the employees' right, guaranteed by Section 7 of the NLRA, "to form, join, or assist labor organizations." We do not dispute that conclusion. Nor do we dispute appellants' additional contention (Br. 21 & n.12) that the Michigan law affects the union's ability to sustain a strike and thereby affects the balance of power between parties to a labor dispute.

---

[7] Statutes in 30 states contain a financing disqualification, and Florida, Massachusetts and Virginia also specify in their statutes that the payment of regular union dues does not constitute financing. See Manpower Administration, U.S. Dep't of Labor, *Comparison of State Unemployment Insurance Laws* 4-12 to 4-14 (Sept. 1985); *id.* Table 405, at 4-45 to 4-47; Fla. Stat. Ann. § 443.101 (West 1981 & Supp. 1985); Mass. Ann. Laws ch. 151A, § 25 (Law. Co-op. 1976 & Supp. 1985); Va. Code § 60.1-52 (Supp. 1982).

[8] Thus, contrary to appellants' suggestion (Br. 19 & n.10), this case does not involve a financing disqualification based simply on the payment of regular union dues. The Michigan law would not disqualify claimants merely because they supported their union financially, even if, as was the case here prior to the dues amendment, a part of their regular dues payment went into a strike fund. Only payments specially raised to support the particular strike that caused the unemployment at issue are covered by the Michigan law. See *Burrell* v. *Ford Motor Co.*, 386 Mich. 486, 494-495, 192 N.W.2d 207, 211 (1971).

But this does not compel the further conclusion that the Michigan statute conflicts with, and is therefore preempted by, the NLRA. "In any preemption analysis, the purpose of Congress is the ultimate touchstone." *Metropolitan Life Insurance Co.* v. *Massachusetts*, No. 84-325 (June 5, 1985), slip op. 22. That is true whether the state law at issue affects rights that Congress affirmatively protected in the NLRA or conduct that it intended to leave unregulated. *Id.* at 24 n.27. In either case, the question is whether Congress contemplated that the scope of the states' prerogative to act was broad enough to embrace the action that allegedly interferes with a federal right or policy. See *Brown* v. *Hotel Employees Union Local 54*, No. 83-498 (July 2, 1984), slip op. 11-17 (state regulation of officers of certain labor unions in casino industry did not impermissibly interfere with Section 7 right to select bargaining agent where "Congress has at least indicated both that employees do not have an unqualified right to choose their own officials and that certain state disqualification requirements are compatible with § 7").

The Court applied these principles in *New York Telephone Co.* to uphold a New York statute awarding unemployment benefits to strikers. Relying primarily on the legislative history of Title IX of the original Social Security Act, the Court concluded that Congress intended to permit states generally to determine the eligibility for benefits of persons unemployed due to a labor dispute, and specifically either to grant or deny benefits to strikers as they see fit. The plurality stated (440 U.S. at 544):

> Undeniably, Congress was aware of the possible impact of unemployment compensation on the bargaining process. The omission of any direction concerning payment to strikers in either the National Labor Relations Act or the Social Security Act implies that Congress intended that the States be free to authorize, or to prohibit, such payments.

The analysis in *New York Telephone* goes a long way toward disposing of this case. *New York Telephone* arose

in a state that paid unemployment benefits to strikers (funded largely by the employer) (440 U.S. at 524 & n.4).[9] Although acknowledging that these payments "altered the economic balance between labor and management (*id.* at 532 (footnote omitted)), the Court nevertheless concluded that Congress intended to leave the states free to grant or deny such benefits.[10] *New York Tele-*

---

[9] New York did not provide compensation in the same manner to strikers and to those not involved in a labor dispute. While benefits were ordinarily authorized after approximately one week of unemployment, an eight week wait was required for a person whose loss of employment was caused by " 'a strike, lockout, or other industrial controversy in the establishment in which he was employed.' " 440 U.S. at 523 (quoting New York statute).

[10] No opinion in *New York Telephone* mustered a majority of the Court. By reading the opinions together, it is clear that a majority of the Court had no doubt about Congress's intent with respect to unemployment compensation as expressed in the legislative histories of the NLRA and the Social Security Act, which were passed within a short time of one another. See 440 U.S. at 540-546 (plurality opinion); *id.* at 546-547 (Brennan, J., concurring in the result); *id.* at 547-551 (Blackmun, J., concurring in the judgment).

What divided the Court was the doctrinal approach to preemption. Three Justices concluded that, in view of Congress's sensitivity "to the importance of the States' interest in fashioning their own unemployment compensation programs and especially their own eligibility criteria," it was appropriate "to treat New York's statute with the same deference * * * afforded analogous state laws of general applicability that protect interests 'deeply rooted in local feeling and responsibility' "; with respect to such laws, "we have stated 'that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act.' " 440 U.S. at 539-540 (plurality opinion), quoting from *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Justice Brennan, while finding "substance in [the plurality's] conclusion that the legislative history of the Social Security Act supports the argument that New York's law should be accorded a deference not unlike that accorded state laws touching interests deeply rooted in local feeling and responsibility," did not specifically adopt that view. 440 U.S. at 546-547 n.* (opinion concurring in the result). Moreover, a majority of the Court rejected the plurality's view, concluding that the "local interests" exception to the preemption doctrine was intended to cover only a limited number of state interests that are at the core of the States' duties

phone, therefore, effectively answers several threshold questions in this case. First, Congress's toleration of a range of responses by the states is surely expansive enough to insulate a state's determination to deny benefits to strikers. After all, a state can be *free* to pay benefits only if it is free to deny them. And second, Michigan's decision not to pay benefits is not preempted by the NLRA merely because it "affects the relative strength of the antagonists in a bargaining dispute" (440 U.S. at 546). *New York Telephone* is premised on the assumption that the statute at issue there disrupted the labor-management equilibrium (not only by paying strikers, but also by compelling employers to underwrite those payments).

To be sure, *New York Telephone* does not dispose of the present case in its entirety. However, even as to two key respects in which this case differs from *New York Telephone*, the Court's disposition of *New York Telephone* provides illumination. Because the statute involved in *New York Telephone* benefited strikers, the Court was not faced with a "claim of interference with employee rights protected by § 7" (440 U.S. at 529). Nevertheless, in rejecting the claim that the New York statute impermissibly interfered with the free process of collective bargaining, the Court necessarily concluded that some interference with that process was tolerable. Moreover, unless states are *obliged* to pay benefits to strikers, a notion at odds with all the views expressed in *New York*

---

and traditional concerns—such as violence, libel, and the intentional infliction of mental distress; that a state unemployment compensation law did not fit in that category; and that, therefore, if such law interferes with the regulatory scheme of the NLRA, it is preempted unless there is evidence of congressional intent to tolerate the state action. See 440 U.S. at 548-551 (concurring opinion of Blackmun, J., in which Marshall, J., joined); *id.* at 559-560 (dissenting opinion of Powell, J., in which Burger, C.J., and Stewart, J., joined).

Accordingly once the Michigan Supreme Court found that the State's action affected rights protected by Section 7 of the NLRA, it placed on the State the burden of showing that Congress intended to tolerate that effect.

Telephone, they remain free to leave strikers uncompensated. Since that course would inevitably lead to claims of interference with a Section 7 right, the decision to grant the states freedom of action must embrace the possibility that some employee rights may be abridged. Thus, the fact of interference with a Section 7 right is not itself dispositive; rather, the question is whether the interference exceeds permissible bounds. *E.g.*, *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967).[11]

A second particular in which this case differs from *New York Telephone* is that here the affected employees were not themselves on strike. Rather, they were laid off because of production cuts at their plants caused by strikes appellants directly financed at other GM facilities. This case thus presents a variation on the theme of persons unemployed due to their involvement in a labor dispute. But, denial of benefits to those who cause their own unemployment by financing strikes at functionally-integrated facilities is no more intrusive on Section 7 rights than denying such benefits to strikers themselves. Indeed, denial of benefits to strikers almost certainly has a more direct effect on the Section 7 right to

---

[11] We do not suggest that Congress intended that states could enact any unemployment compensation provision they desire, irrespective of the provisions of the NLRA. In *Nash* the Court held that a state's disqualification for benefits of an individual for filing unfair labor practice charges with the NLRB—on the ground that the mere filing of charges constituted a disqualifying "labor dispute" within the meaning of the state's labor dispute disqualification provisions—conflicted with the federal labor policy prohibiting retaliation or coercion of individuals who file charges with the NLRB. The Court found it "obvious * * * that this financial burden which Florida imposes will impede resort to the Act and thwart congressional reliance on individual action." 389 U.S. at 239. Accordingly, the Court concluded that the regulation "stood ' "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ' " *Id.* at 240 (quoting *Hill* v. *Florida*, 325 U.S. 538, 542 (1945)).

The regulation involved in *Nash* could not be said to have been within Congress's contemplation as appropriate state action when it enacted the Social Security Act of 1935.

strike since the denial would bring pressure directly on those contemplating taking strike action. The Michigan law therefore fits comfortably within the range of options that, as this Court recognized in *New York Telephone*, Congress left open to the states.

B. The Legislative History Demonstrates That Congress Intended States To Be Free To Determine The Eligibility Of Persons Unemployed Due To A Labor Dispute, Notwithstanding The Effect Of Those Decisions On Interests Protected By The NLRA

The simultaneous consideration and contemporaneous enactment of the NLRA and the Social Security Act, including debate on the issue of labor dispute disqualification, require that both Acts be examined to learn Congress's intent in 1935. In acting against a backdrop of massive unemployment, Congress's primary concern in enacting the unemployment compensation provisions in Title IX of the original Social Security Act was to ameliorate the adverse social and economic effects of this substantial involuntary unemployment. See H.R. Rep. 615, 74th Cong., 1st Sess. 8 (1935); S. Rep. 628, 74th Cong., 1st Sess. 11 (1935). However, Congress also focused sharply on the need to protect the freedom of choice for each state in determining the balance to be struck in the distribution of economic benefits and burdens under the unemployment compensation system.

After examining the legislative history of Title IX, this Court found it "abundantly clear" that "'[e]xcept for a few standards which were necessary to render certain that the State ~~unemployment~~ compensation laws [were] genuine unemployment compensation acts and not merely relief measures, the states [were] left free to set up any unemployment compensation system they wish, without dictation from Washington.'" *New York Telephone*, 440 U.S. at 537 & 543 n.42, quoting S. Rep. 628, *supra*, at 13. To this same effect, the Senate report also stated that "[s]uch latitude is very essential because the rate of unemployment varies greatly in different states, being twice as great in some states as in others. * * *

In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the states which type of unemployment compensation law they should adopt." Thus, the states were left free of federal "dictation" and could "decide for themselves which type best suits their peculiar conditions." S. Rep. 628, *supra*, at 13-14.[12]

In choosing not to impose federal restrictions on the payment of unemployment benefits to strikers, Congress followed the recommendation of the Report of the Committee on Economic Security that, since "considerable controversy has developed over the type of unemployment compensation legislation that should be enacted," including "the type of unemployment to be benefited," it was desirable to permit "considerable variation, so that we may learn through demonstration what is best."[13] *Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 1323 (1935) [*Senate Hearings*]. The legislation ultimately adopted by Congress was thus intended to permit "variations in State laws but insure[s] uniformity in respects in which uniformity is absolutely essential" (*ibid.*).

Consistent with this intent, Section 903(a) of the original Act, 49 Stat. 640 (now codified at 26 U.S.C. 3304(a)), provided that a state unemployment compensation law must meet only six specific requirements to qualify under the federal scheme. The one requirement that relates to benefit eligibility provides that (26 U.S.C. 3304(a)(5)):

> [C]ompensation shall not be denied * * * to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

---

[12] Of five state statutes referred to and approved in the Senate report, four of them denied unemployment benefits to striking employees. S. Rep. 628, *supra*, at 13-14.

[13] In *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130 (1971), this Court recognized that the "Social Security Act received its impetus from the Report of the Committee on Economic Security."

(A) if the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

Section 903(a) shows that, when Congress wanted to require states to have certain eligibility standards, it knew how to say so. See *New York Telephone*, 440 U.S. at 538 n.29; *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 488 & n.16 (1977). Of particular significance to the present inquiry, Congress adopted these eligibility conditions for the very purpose of insuring "the compatibility of state unemployment compensation laws with the then brand-new labor statute." *Grinnell Corp.* v. *Hackett*, 475 F.2d 449, 454-455 (1st Cir.), cert. denied, 414 U.S. 858 (1973). See Burns, *Unemployment Compensation and Socio-Economic Objectives*, 55 Yale L.J. 1, 17 n.49 (1945).[14]

After reviewing the legislative history of the Social Security Act and the Act's specific eligibility conditions for benefits, this Court concluded in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 488-489 (1977)—as it did in *New York Telephone*, 440 U.S. at 536-538—that Congress intended to leave the states free to determine the eligibility of persons unemployed due to labor disputes. In *Hodory*, the Court approved Ohio's labor dispute provision, which at the time the case arose broadly disqualified an employee if " '[h]is unemployment was due to a labor dispute other than a lockout at any factory, establishment, or other premises located in this

[14] As further evidence of legislative intent, the Court in *New York Telephone* noted (440 U.S. at 544) that the Social Security Board and later the Department of Labor had never raised a question about the state's unemployment compensation law. The Michigan law at issue here has a similar record of administrative acceptance.

or any other state and owned or operated by the employer by which he is or was last employed' " (431 U.S. at 473).[15] Although that case did not present a claim of presumption under the NLRA, and did not require consideration of the relationship between the NLRA and the state law at issue (*id.* at 475 n.3), the Court rejected the argument that Congress intended in the Social Security Act and in "draft" unemployment compensation bills prepared by the Social Security Board[16] following the Act's passage, to require states to pay benefits to workers involuntarily unemployed due to labor disputes.

The Court noted (431 U.S. at 485) that the draft bills were " 'merely suggestive,' " and that the Social Security Board had made clear that " 'it is the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted.' " Moreover, the Court found that the very draft

[15] While most states require that the labor dispute resulting in a claimant's unemployment occur at the plant in which the claimant worked, Ohio and Michigan are among seven states that define the location of a disqualifying dispute more broadly to include other plants owned by the employer. See *Comparison of State Unemployment Insurance Laws, supra*, at 4-13. These provisions generally were designed to protect against requiring employers to finance, and states to pay, benefits where a strike called by a union at one plant results in a foreseeable lack of production and layoffs at the employer's other plants. See W. Lewis, *Unemployment Compensation Law in Labor Disputes: Michigan Compared with Seven Selected States 1936-1964*, at 41 (1964).

As the Court noted in *Hodory*, the Ohio law was subsequently amended so that it now resembles in relevant respects the Michigan statute at issue here. The disqualification continues to extend to disputes either at the claimant's own plant or any other plant owned by his employer, but disqualification is limited to persons who are " 'financing, participating in, or directly interested in [the] labor dispute.' " 431 U.S. at 473-474 n.1.

[16] Under the original Act, the Social Security Board was empowered to review state unemployment compensation plans and to determine whether they were consistent with the conditions set forth in Title IX (§ 903(a), 49 Stat. 640). That function is now performed by the Secretary of Labor. 26 U.S.C. 3304.

bills approved by the Social Security Board "could serve to disqualify even a person who actively opposed a strike and could extend to persons laid off because of a dispute at another plant owned by the same employer" (*id.* at 485-486). In addition, the Court found that states have an interest in broadly disqualifying individuals unemployed due to a strike in order to preserve the "fiscal integrity" of their unemployment compensation funds (*id.* at 491). Because an employer's unemployment insurance contribution costs rise for every laid-off worker who is qualified to collect unemployment compensation, a state may properly limit the employers' costs by barring benefits to anyone unemployed due to a strike against his employer (*id.* at 491-492). Finally, the Court noted the absence of any provision pertaining to labor dispute disqualifications in the Social Security Act and concluded (*id.* at 488-489):

> [W]hen Congress wished to impose or forbid a condition for compensation, it was able to do so in explicit terms. * * * The fact that Congress has chosen not to legislate on the subject of labor dispute disqualifications confirms our belief that * * * the Social Security Act was [not] intended to restrict the States' freedom to legislate in this area.

Thus, the legislative history that formed the basis of the Court's decisions in *Hodory* and *New York Telephone* makes clear that, in choosing not to legislate on the subject of labor dispute disqualifications, Congress left the states free, " 'without dictation from Washington' " (440 U.S. at 543), to determine a broad range of policy issues concerning the eligibility for benefits of persons unemployed due to a labor dispute, notwithstanding the effect of certain of those decisions on interests protected under the NLRA. As we now show, the legislative materials further demonstrate that Congress intended, as part of the states' broad freedom in this area, to allow states to disqualify employees from unemployment compensation on the basis of their direct financial support of the labor dispute that resulted in their unemployment.

C. Congress Intended That States Have Sufficient Latitude To Choose To Disqualify Employees On The Basis Of Their Payment Of Financial Support Specifically And Meaningfully Connected To The Labor Dispute Causing Their Unemployment

The remaining question in this case is whether states are free to disqualify not only strikers but also persons who financially supported a strike against their employer that caused their own unemployment. The legislative history clearly shows Congress's intent to permit the states to do so. As we now show, Congress was aware of pre-existing state laws that disqualified persons other than strikers. That understanding was carried forward in early proposals generated by the Social Security Board that authorized financing disqualifications, and by laws in a majority of states adopting some form of financing disqualification. In addition, over the past 50 years the Social Security Board and the Labor Department have never objected to such provisions. This unbroken record of administrative acceptance, which is entitled to considerable deference, further reflects Congress's intent to let the states develop plans with a minimum of federal interference.

1. Prior to enactment of the Social Security Act in 1935, only a handful of states had passed unemployment compensation laws, and the labor dispute provisions of those states' laws did not seek to distinguish between groups of employees on the basis of their "direct involvement" in a labor dispute. Rather, the provisions disqualified *all* employees out of work due to a dispute in progress at their place of employment, without regard to whether they were directly involved or were simply laid off due to a lack of work.[17] Thus, Congress's preenactment understanding of the permissible scope of labor dispute dis-

---

[17] See 1932 Wis. Laws 63 (as amended, 1935 Wis. Laws 292); 1935 Cal. Stat. 1238; 1935 Mass. Acts 644; 1939 N.H. Laws 164-165; 1935 Utah Laws 44; 1935 Wash. Laws 451.

New York's law granting benefits to persons unemployed due to a labor dispute did so only after an extended waiting period, but the waiting period was not limited to persons directly involved in the dispute. 1935 N.Y. Laws 1032-1033.

qualifications was not limited simply to the question of striker eligibility.

Similarly, in draft unemployment compensation bills presented to Congress by the President's Committee on Economic Security and the American Association for Social Security during hearings on the Social Security Act, the labor dispute provisions broadly disqualified any claimant whose "unemployment is due to a labor dispute" or "who has lost his employment or has left his employment by reason of a strike." See *Senate Hearings* 601, 472. For the purpose of determining the validity of the statute at issue in *New York Telephone*, the Court properly concluded that those provisions would at a minimum have disqualified actual strikers (440 U.S. at 543 n.41), and that in choosing not to legislate on the subject of labor dispute disqualifications Congress therefore at least left the states free to determine the eligibility of strikers. But the proposals of which Congress was aware also disqualified many claimants in addition to actual strikers; accordingly, as *Hodory* makes clear, in enacting the Social Security Act Congress necessarily contemplated that states would be free to disqualify some or all of such additional persons. Given this history, there is no principled basis upon which to conclude that in 1935 Congress intended to tolerate the disqualification only of strikers and not of persons who had made financial contributions to a strike that resulted in their loss of employment.

Moreover, immediately following passage of the Social Security Act the Social Security Board, established in Title VII, 49 Stat. 635, prepared a set of draft bills disqualifying a worker unless "[he] is not participating in or financing or directly interested in the labor dispute" or "does not belong to a grade or class of workers * * * any of whom are participating in or financing or directly interested in the dispute." [18] U.S. Social Security Board, *Draft Bills*

[18] Appellants suggest (Br. 27) that because the financing disqualification "in the Board's 1936 draft bill did not surface until *after* the passage of the SSA" it is of little probative value in

For State Unemployment Compensation of Pooled Fund and Employer Reserve Account Types § 5(d)(1) and (2) (1936) [*Draft Bills*]. The draft bills, modeled on the British Unemployment Insurance Act, were designed to aid the states in developing their own statutes. See M. Hughes, U.S. Social Security Administration, *Principles Underlying Labor-Dispute Disqualification* 3 (1946); 1936 Soc. Security Bd. Ann. Rep. 41 (1937). The bills thus provided an alternative for states that chose not to adopt a blanket exclusion of the kind approved in *Hodory*, but that nonetheless wished to disqualify claimants, other than actual strikers, who were directly "implicated" in a labor dispute. See Lesser, *Labor Disputes and Unemployment Compensation*, 55 Yale L.J. 167, 168 (1945); Fierst & Spector, *Unemployment Compensation in Labor Disputes*, 49 Yale L.J. 461, 462-463 (1940).[19] In a preface to the bills the Social Security Board stated that its provisions met "the minimum standards * * * in the Social Security Act for State unemployment compensation laws," but, as the Court noted in *Hodory*, the Board also stated that the draft bills were "merely suggestive" and

assessing congressional intent. However, the Court in *New York Telephone* found relevant to assessing congressional intent the fact that "the administrative agency originally charged by Title IX of the Act with qualifying state statutes for federal funds * * * [had] approved the New York statute." 440 U.S. at 544 n.43. The same unbroken line of administrative acceptance exists here.

[19] The draft bill provisions concerning participation and financing were designed to disqualify claimants who had manifested their direct involvement by some identifiable conduct. The "grade or class" and "direct interest" provisions were intended to disqualify individuals who had an interest in the outcome of the strike, even if they were not participating in or they actively opposed the strike. See *Hodory*, 431 U.S. at 485-486. The purpose of the latter provisions was to prevent a "keyman" strike by a small number of pivotal workers who could halt production "in the knowledge that a majority of the workers will get benefits and thus augment the workers' fighting fund," and also to prevent the unemployment compensation system from being "used to induce defections from a union which calls a strike by the promise of benefits to workers who take no part in the dispute." Lesser, *supra*, 55 Yale L.J. at 169.

were not intended to displace the authority of each state to draft labor dispute disqualifications as it saw fit. *Draft Bills* 1 preamble.

State laws containing the draft labor dispute provision, including the financing disqualification, were immediately adopted by the vast majority of states.[20] Despite the draft bills' objective of limiting the broad labor dispute disqualification in existence prior to the Social Security Act, early interpretations of the financing provision drew on decisions under the British statute to hold broadly that all members were deemed to be financing a union's strike simply by paying regular union dues. See M. Hughes, *supra*, at 67-69 (discussing cases); Federal Security Agency, *Social Security Board Yearbook 1940*, at 71 (1941). In response to strong criticism of this interpretation the states began to narrow their disqualifications. See Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. Chi. L. Rev. 294, 328 (1950).

Accordingly, in 1937, Michigan amended its financing-disqualification to exclude "regular union dues" from the type of payments that would preclude unemployment compensation.[21] Other states similarly qualified the financing provisions in their statutes, either by interpretation or, as in Michigan's case, by statutory amendment. See Shadur, *supra*, 17 U. Chi. L. Rev. at 328. And in a 1940 memorandum prepared by the Social Security Board for use by its staff in consulting with states, the Board

[20] By 1937, at least 40 states had adopted financing disqualifications. The remaining states adopted a blanket disqualification, without regard to a claimant's involvement in the dispute causing his unemployment. See Bureau of Unemployment Compensation, U.S. Social Security Board, *A Comparison of State Unemployment Compensation Laws* 46-47 (1937); Fierst & Spector, *supra*, 49 Yale L.J. at 463.

[21] In a 1963 amendment, Michigan added the parenthetical language specifying that payments would escape disqualification if they are "in amounts and for purposes established prior to the inception of the labor dispute." *Baker* v. *General Motors Corp.*, 74 Mich. App. 237, 246, 254 N.W.2d 45, 50 (1977).

reflected the emerging narrow view of financing disqualifications by stating that "[t]he provision found in some laws extending the disqualification to individuals who are financing a labor dispute is not recommended since it might operate to disqualify an individual not concerned with the dispute solely on the basis of his payment of dues to the union that is conducting a strike." Bureau of Employment Security, U.S. Social Security Board, *Proposed State Legislation Providing for Unemployment Compensation and Public Employment Offices* 56 note (Nov. 1940). By the mid-1950's it was generally accepted by commentators and the states "that the payment of union dues alone is not enough to establish a financing in a labor dispute." Williams, *The Labor Dispute Disqualification—A Primer and Some Problems*, 8 Vand. L. Rev. 338, 349-350 (1955). It remained equally clear, however, that "[s]pecific payment of contributions or strike benefits to the striking union would establish a financing." *Id.* at 349.[22]

[22] Appellants contend (Br. 28) that the Social Security Board's 1940 memorandum to the effect that a financing provision "is not recommended since it might operate to disqualify an individual not concerned with a dispute solely on the basis of his payment of dues to the union" is specific evidence that the Board would regard Michigan's disqualification as inconsistent with congressional intent. Appellants are incorrect. Read in the context of the historical development of state financing provisions, the Board's statement was critical only of the then-current view in some states that the payment of regular union dues, unconnected to a particular labor dispute, could constitute financing. But the Board continued to recognize the states' interests in disqualifying claimants "directly involved" in the dispute causing their unemployment, and it was never questioned that the "[s]pecific payment of contributions or strike benefits to the striking union would establish a financing." Williams, *supra*, 8 Vand. L. Rev. at 349.

In any event, as noted above (p. 20), this Court made clear in *Hodory* that the statements of the Social Security Board were merely precatory and were never intended to supplant "'the final responsibility and the right of each state to determine for itself just what type of legislation it desires and how it shall be drafted'" (431 U.S. at 485 (quoting the *Draft Bills* 1)). Indeed, in a preface to a 1942 revised version of its 1940 memorandum, the

Thus, history shows that financing disqualifications were first proposed by the Social Security Board itself and adopted by a majority of states immediately following passage of the Social Security Act. Through experience states have chosen to narrow the scope of disqualification based on financing, and Michigan's provision reflects that development by expressly excluding regular union dues and confining its application to claimants who in the state's view manifest their direct involvement in a dispute by contributing extraordinary payments that are meaningfully connected to the dispute. As was the case with the statute approved in *New York Telephone*, Michigan's financing provision, as well as the financing provitions in every other state, have never met with any objection from the Social Security Board or the Department of Labor. *Comparison of State Unemployment Insurance Laws*, *supra* note 7, Table 405, at 4-45 to 4-47. And, as in *New York Telephone*, Congress has never expressed its disapproval of labor dispute disqualifications based on financing, but in considering subsequent amendments to the Social Security Act has indicated that states remain free broadly to specify "the conditions for disqualification * * * for unemployment due to a labor dispute" (statements in both the House and Senate Report on the Employment Security Amendments of 1969 and 1970). H.R. Rep. 91-612, 91st Cong., 1st Sess. 18-19 (1969); S. Rep. 91-752, 91st Cong., 2d Sess. 23-24 (1970).

2. Appellants principal contention (Br. 25-26) is that, notwithstanding the evidence concerning the development of financing disqualifications subsequent to enactment of the Social Security Act, there is no affirmative evidence that Congress was aware of such a ground for disqualification *prior* to the Act's passage. Appellants assert that

---

Board stated that it "[was] not intended to restrict the scope or direction of State legislation nor to standardize the methods for developing a better social insurance program." Bureau of Employment Security, U.S. Social Security Board, *Manual of State Employment Security Legislation* at iii (Nov. 1942).

by contrast, Congress *was* specifically made aware of proposals to disqualify *strikers* prior to passing the Social Security Act, and that in choosing not to legislate on labor dispute disqualifications Congress therefore intended to permit only that limited disqualification, approved in *New York Telephone*, and no other. Contrary to appellants' contention, the legislative record plainly demonstrates Congress's awareness that states could choose to disqualify persons other than actual strikers (see pp. 21-24, *supra*). Indeed, some states had already done so (*ibid.*).

Nor is there merit to appellants' contention (Br. 29-30) that the omission of a financing provision from the District of Columbia unemployment law is evidence that such a provision is inconsistent with congressional intent. In enacting the District of Columbia law in 1935, Congress was acting in a capacity similar to that of a state legislature. It does not follow from the choice made by Congress, as local lawmaker, that the same policy judgment was mandated nationwide. Indeed, Congress's decision to deny benefits to strikers in the District of Columbia did not preclude New York from taking exactly the opposite view. Congress was committed to "free local choice," and "it neither assumed nor intended that its passage of the NLRA" would preempt either the payment or denial of benefits to strikers or to persons who specifically and directly financed the strikes that resulted in their unemployment (440 U.S. at 543 n.41).

Appellants assert (Br. 20) that, because under the Union's constitution employees can be required to pay dues as a condition of maintaining membership, Michigan's disqualification, notwithstanding that it is limited to the payment of extraordinary assessments specifically in support of a strike, puts claimants to the choice of forgoing eligibility for benefits or jeopardizing their union membership. Accordingly, they contend, it runs afoul of Section 903(a) of the orginal Social Security Act (recodified at 26 U.S.C. 3304(a)(5)(C)), which prohibits states from requiring as a condition of eligibility that an unemployed

claimant accept substitute employment "if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization." [23] Appellants' argument is not persuasive. As this Court made clear in *Hodory* and *New York Telephone*, Section 903(a) does not preclude a state from denying benefits to a claimant whose unemployment is due to his involvement in a labor dispute, even where that "involvement" consisted of going out on strike. A financing disqualification presents a claimant with no different choice than does a disqualification based on strike participation. An employee may thus be compelled either to strike or to contribute to a strike as a condition of maintaining union membership, but that fact alone does not preclude a state from disqualifying employees from benefits on either ground.

[23] Appellants no longer make the claim, contained in their jurisdictional statement (at 11-12) that Michigan disqualified claimants based on their payment of " 'the periodic due * * * uniformly required' " as a condition of employment under a valid union security agreement. See Section 8(b)(2) and (a)(3) of the NLRA, 29 U.S.C. 158(b)(2) and (a)(3). As the record shows (J.S. App. 20a, 107a), there was no collective bargaining agreement in effect, and no operative union security clause, at the time the special strike contributions were assessed. Appellants therefore could not have been discharged for refusing to pay the dues, and the Michigan Employment Security Board of Review expressly relied on that fact in finding that the payments could serve as grounds for disqualification (J.S. App. 107a). This case thus presents no issue of a conflict between the state's disqualification provision and the NLRA provision that employees governed by a union security clause can be required to pay regular dues as a condition of keeping their jobs. Although the General Counsel administratively determined (n.3, *supra*) that the union's strike assessment constituted a permissible change in "periodic dues" that could be required of other UAW members working under a union security agreement, the Board did not have an opportunity to pass on that question. The Board's settled interpretation is that special strike assessments do not constitute periodic dues which could lawfully be required under a union security clause. See *Carpenters Local 455*, 271 N.L.R.B. 1099, 1100 (1984); *Food Fair Stores* v. *NLRB*, 307 F.2d 3, 11 (3d Cir. 1962); *Peerless Tool & Engineering Co.*, 111 N.L.R.B. 853, 871 (1955).

Finally, appellants assert (Br. 33) that they have discovered no cases other than the decision below "holding that claimants were disqualified solely * * * on grounds of 'financing.' " They accordingly suggest that, because the result that Michigan reached in this case assertedly represents an isolated view that other states would not share, Michigan's financing disqualification cannot be said to have been within the contemplation of Congress at the time it enacted the NLRA and Social Security Act. Appellants, however, point to no case, nor have we discovered any, that disapproves a financing disqualification of the kind here involved. Indeed, the cases cited by appellants all suggest that financial contributions that are specifically and meaningfully connected to a labor dispute would *alone* constitute adequate grounds for disqualification.[24]

[24] See *General Motors Corp.* v. *Bowling*, 85 Ill. 2d 539, 545, 426 N.E.2d 1210, 1213 (1981) ("A payment of money is not 'financing' a labor dispute unless there is a meaningful connection between the payment and the dispute.") (citing with approval *Baker* v. *General Motors Corp.*, 409 Mich. 639, 297 N.W.2d 387 (1980)); *Outboard, Marine & Mfg. Co.* v. *Gordon*, 403 Ill. 523, 538, 87 N.E.2d 610, 618 (1949) (suggesting that payment of support would constitute financing if it was specifically related to a strike and was "used in any part for strike benefits or to assist in any particular in prolonging the strike"); *Burrell* v. *Ford Motor Co.*, 386 Mich. 486, 494-495, 192 N.W.2d 207, 211 (1971) (payment of non-regular dues in amounts and for purposes connected to a labor dispute could constitute financing); *Burgoon* v. *Board of Review*, 100 N.J. Super. 569, 579, 242 A.2d 847, 853 (App. Div. 1968) (claimants disqualified in part on financing grounds where their dues to their international union "were used, at least in part, to finance the strike"); *Soricelli* v. *Board of Review*, 46 N.J. Super. 299, 311, 134 A.2d 723, 729 (App. Div. 1957) (payment of $1.00 to a fund in support of striking employees "alone would disqualify claimant from benefits"). But cf. *United Steel Workers* v. *Meierhenry*, 608 F. Supp. 201, 202-203, 205-209 (D.S.D. 1985), appeal docketed *sub nom. Johnson* v. *United Steelworkers*, No. 85-5105 (8th Cir.) (unlawful for state to deny benefits to union dues-paying members while awarding them to nonmembers working in the same bargaining unit, even though *all* unit employees were subject to disqualification as "directly interested" in the outcome of the dispute within the meaning of the

Even if appellants were correct and other states would not interpret their financing disqualifications as Michigan did here, there would still be no basis for concluding that Congress intended to prevent Michigan from reaching that result. The New York statute approved in *New York Telephone*, for example, was one of only two in the nation that granted benefits to strikers, and New York is currently alone in its view on that issue. See *Comparison of State Unemployment Insurance Laws*, *supra*, at 4-13. In choosing not to legislate on the subject of labor dispute disqualifications and in leaving the matter to the states, Congress contemplated that the states would constitute "separate laboratories" (*New York Telephone*, 440 U.S. at 541 n.36), that there would be "considerable variation" and that "no two State laws [would be] alike" (*Senate Hearings* 1323; *Comparison of State Unemployment Insurance Laws*, *supra*, at iii), and that preemption would not " 'hinge upon the myriad provisions of state unemployment compensation laws.' " *New York Telephone*, 440 U.S. at 535 (quoting *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 365 (1951)). Michigan, as the home state to a large industrial employer with operations nationwide, has sought to protect its unemployment compensation funds from excessive drain and to avoid subjecting the employer to the increased contribution costs that would result from paying benefits to individuals who contribute direct financial support to strikers at their employer's other plants in circumstances where, due to the employer's vertical integration, those strikes would foreseeably lead to their own unemployment. See n.15, *supra*. In this complex area of social policy, that is a judgment Congress left states free to make on the basis of their own experience. See *Hodory*, 431 U.S. at 492-493.

---

state statute; in so holding, however, the court did not disapprove the use of a financing disqualification keyed to payments specifically in support of particular strikes that manifest a claimant's direct involvement in a labor dispute).

CONCLUSION

The judgment of the Michigan Supreme Court should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

CAROLYN B. KUHL
Deputy Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

JANUARY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20139